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United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as
Administrator of the Estate of William F. Leland,
Deceased, and C. W. BREAKIRON, Successor Receiver
for Atlantic and Pacific Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED, ORION IN-
SURANCE COMPANY, LIMITED, THE DRAKE INSURANCE
COMPANY, LIMITED, subscribing underwriting mem-
bers of Lloyd's, London,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

J. CHARLES DENNIS

United States Attorney.

HOUGHTON, CLUCK, COUGHLIN & HENRY,
*Attorneys for R. P. Jandl, as Adminis-
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FILED

535 Central Building,
Seattle 4, Washington.

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United States Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P.
JANDL, as Administrator of the Estate
of William F. Leland, Deceased, and
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ITED, ORION INSURANCE COMPANY, LIM-
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members of Lloyd's, London,

Appellees.

No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENTS REGARDING PLEADINGS AND JURISDICTION

This appeal is from a judgment denying recovery on a policy of aircraft insurance. The principal plaintiff is R. P. Jandl, administrator of the estate of William F. Leland who was the owner of the insured aircraft and was killed in the accident in which it was destroyed. United States of America and C. W. Breakiron, Receiver, joined as plaintiffs because they have

an interest in the insurance proceeds as mortgagees of the insured property.

The complaint alleges and the answer admits that the amount in controversy, exclusive of interest and costs, exceeds \$3,000 and that the defendants are subjects of the British Empire (R. 3, 4, 8). The District Court had jurisdiction under U.S.C.A., New Title 28, §1332 (2) and §1345, on the ground of diversity of citizenship and because the United States is a plaintiff.

Jurisdiction of this court to review the judgment is conferred by U.S.C.A., New Title 28, §§ 1291, 1294, and by Rules of Civil Procedure for District Courts, Rule 73.

The amended complaint contains two claims or causes of action. The first claims \$20,054.47 and interest under Section 1 of the policy for loss or damage to the insured aircraft. The second claim is under Section 2 of the policy for indemnity against a judgment for \$2,566.70 obtained by King County, Washington, against Leland's estate for damages caused to its retirement hangar by the insured airplane. The second claim also asks judgment for expense incurred in defending that action after the appellees refused to defend it (R. 29, 30, 31).

STATEMENT OF THE CASE

All material facts pleaded in the amended complaint were admitted by appellees or proved by undisputed evidence. Aside from merely formal matters, these facts are: On July 21, 1948, appellees issued Lloyd's Certificate of Insurance No. W-OMA-253 (herein sometimes called "the policy") to Leland, insuring him as the owner of Douglas DC-3 airplane No. NC-79025. A true copy of the policy is attached to the amended complaint as Exhibit A (R. 8, 25, 26, 66).

Section 1 of the policy, insofar as it appears material to this case, reads:

"SECTION 1—LOSS OR DAMAGE TO AIRCRAFT

"A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost, wear and tear, gradual deterioration, mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Underwriters that such loss or damage was caused by a servant or agents or person under the control of the Assured.

"B. It is understood and agreed that Underwriters' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value including all equipment and accessories, as set forth in Column 8 of the Schedule, subject each and every claim in respect of Flight Risks to the

deductible applicable to each such Aircraft as set forth in Column 10 of the Schedule.

“C. Insurance as provided under this Section shall apply only to Aircraft for which a premium charge as set forth in Column 11 of the Schedule and Flight Risks are insured only in respect of such Aircraft for which a specific amount of deductible is set forth in Column 10 of the Schedule” (R. 44).

Section 1 of the Schedule reads:

SECTION 1	
LOSS OR DAMAGE TO AIRCRAFT	
Deductible	Premium
“Flight Risks”	Charge
Column 10	Column 11
\$1250.00	\$1750.00
PREMIUM	\$1750.00
TAXES	\$ 122.68
	\$1872.68

The agreed value of the aircraft, as set out in Column 8 of the Schedule, was \$25,000. (R. 43)

Section 2 of the policy, insofar as it appears material to this case, reads:

“SECTION 2—THIRD PARTY LIABILITY

“1. The Underwriters will indemnify the Assured, within the limits specified in the Schedule, against all sums which the Assured shall become legally liable to pay as compensation, including costs awarded to any claimant, caused by or through or in connection with the Aircraft described in the Schedule, or articles dropped therefrom, under that Coverage or those Coverages set forth herein for which specific limits of liability

corresponding both to Aircraft and Coverage are set forth in the Schedule for each such Aircraft.

* * *

“Coverage B—Property Damage: Loss from liability imposed by law upon the Assured for damage to or destruction of property (excluding property owned, rented, leased, in charge of or transported by the Assured), including the loss of use thereof, caused by accident.

* * *

“2. The Underwriters will, in addition, defend, until they elect to pay their limit of liability, in the name of and on behalf of the Assured any claim or suit, whether groundless or not, brought against the Assured and in respect of which the Assured is entitled to indemnity under this Certificate and/or Policy, provided that the Underwriters shall have the right to make such investigation, prosecution, negotiation, and settlement of any claim or suit as they may deem expedient; the Underwriters will pay all costs taxed against the Assured and expenses incurred by or with the consent of the Underwriters in defending such claims or suits, including interest accruing after entry of judgment on that part of the judgment not in excess of the limit of liability of the Underwriters.” (R. 44)

Section 2 of the Schedule reads:

**“SECTION 2—THIRD PARTY LIABILITY
LIMITS OF LIABILITY**

Coverage A		Coverage B		Coverage C	
Public Liability (Excluding Passengers) One Person		Property Damage One Accident		Passenger Liability One Accident	
Col. 12	Col. 13	Col. 14	Col. 15	Col. 16	Col. 17
\$100,000	\$300,000	\$100,000	\$10,000	\$280,000	\$2215.00
				Premium	\$2215.00
				Taxes	155.05
(R. 43)					\$2370.05

On Jan. 2, 1949, while the policy was in effect with all premiums fully paid, the insured aircraft crashed and burned in an attempted take-off at Boeing Field, King County, Washington, completely destroying the aircraft and all equipment and accessories attached to and forming a part of it except for salvage worth \$390.20. The actual and agreed value of the aircraft was \$25,000 (R. 9, 10, 29, 66, 68).

During the attempted take-off the insured aircraft crashed into a revetment hangar owned by King County, causing damage thereto for which the county filed a claim and brought suit against Leland's estate in the Superior Court of King County, Washington. Appellant administrator notified appellees of the filing of the claim and the commencement of suit thereon, but they refused to settle or defend it. The administrator then undertook the defense and notified appellees that they would be held liable for attorneys' fees and other

expense of defending the action. The case was tried and the Court rendered judgment against Leland's estate for \$2,566.70 damages plus costs of suit (R. 30, 31, 66, 69 to 72, 126 to 131). In defending the action appellant administrator incurred \$34.90 Court expense plus reasonable attorneys' fees. The parties have stipulated that \$500 shall be the amount allowed as such attorneys' fees if the administrator is entitled to recover therefor (R. 67, 136).

Appellees refuse to pay anything on either claim. Before this suit was commenced they paid the United States \$3,305.33 under Section 1 of the policy and Endorsement No. 6 (R. 8, 26).

The Court's opinion and the findings of fact show that it based its decision solely upon its finding that all of the damage to the insured airplane and the revetment hangar was proximately caused by Leland's negligence and failure to use due diligence in the operation of the airplane and that such negligence and failure to use due diligence violated Paragraph 3 of the general conditions of the policy (R. 76 to 79, 91, 92). That paragraph (hereinafter called "General Condition 3") reads:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories" (R. 44, 78).

QUESTIONS INVOLVED

1. Is the purpose and effect of General Condition 3 to exclude insurance coverage as to any loss or damage caused by the negligence of the Assured, or is it to prescribe the duties of the insured with regard to mitigating loss or damage and ensuring the safety of the aircraft in the event that it sustains damage?

2. If the policy were construed so as to exclude insurance coverage as to any loss or damage caused by the Assured's negligence, did the insurers sustain their burden of proving the affirmative defense of negligence?

3. Did the trial court commit prejudicial error in excluding testimony and offer of proof submitted by plaintiffs that other passenger-transport aircraft took off safely from the same airport and runway immediately prior to the crash, that the pilots thereof found runway and weather conditions to be safe, and that the pilot of the Assured's plane took off after regular clearance with the air traffic controller in the control tower?

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making findings of fact numbered IX, X and XI (R. 91, 92) because the evidence does not sustain the finding that Leland was negligent or failed to use due diligence in the operation of the airplane, or that his negligence, if any, was a proximate cause of the damage to the insured property or the revetment hangar or violated any of the terms or conditions of the insurance policy.

2. In making its conclusions of law and judgment, holding that appellants are not entitled to any of the relief prayed for and dismissing their action with prejudice and without costs (R. 93, 94).

3. In excluding the testimony and offer of proof submitted by plaintiffs that other passenger-transport aircraft took off safely from the same airport and runway immediately prior to the crash, that the pilots thereof found runway and weather conditions to be safe, and that the pilot of the assured's plane took off after regular clearance with the air traffic controller in the control tower.

ARGUMENT

As Specifications of Error number 1 and 2 involve the same questions of law and fact we will argue them together.

We shall present argument under three headings, each corresponding to one of the three questions set forth above.

Under Heading I we shall urge that the effect of General Condition 3 was not to exclude coverage for loss or damage caused by the assured's negligence, but to prescribe certain duties of the assured in the event that the aircraft sustains damage.

Under heading II we shall examine the evidence and show that even if a condition making negligence a defense has been written into the policy, still the plaintiffs should recover because defendants failed to sustain the burden of proving their affirmative defense of negligence.

Under heading III we shall urge that the trial court committed prejudicial error in excluding plaintiffs' testimony and offer of proof relating to weather and air traffic conditions on the same airport and runway immediately before the crash.

We respectfully submit that the material presented under heading I should be sufficient to dispose of this case, but we offer argument under headings II and II for completeness.

I.

The Purpose and Effect of General Condition 3 is Not to Exclude Coverage for Assured's Negligence But to Prescribe Certain Duties of Assured In the Event of Damage.

The District Court interpreted the policy, particularly General Condition 3, so as to exclude coverage for any loss or damage caused by the negligence of the assured. We submit that this interpretation is untenable; that General Condition 3, when reasonably construed and related to the policy as a whole, has the purpose and effect of prescribing the duties of the assured with respect to mitigating loss or damage and ensuring the safety of the aircraft, in the event that it sustains damage.

An interpretation excluding coverage for negligence would defeat the primary purpose of the policy.

It is too clear for argument that the primary purpose of one purchasing such a policy would be to safeguard himself against the consequences of negligence, whether committed by himself or by his agents or employees. If the insured were certain that he and all others con-

cerned would be careful at all times, there would be far less sense in paying for coverage. This is especially true in a case like this, where the aircraft and the business connected with it must be handled by various agents or employees of the insured, and where any of a number of acts done or not done might be classified as technical "negligence."

Notice that the insuring clause, "Section 1, Loss or Damage to Aircraft" (p. 3 hereof) provides that

"A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst *in flight or on the ground* or on the water * * * *from whatever cause arising* except frost * * * but including *accidental* damage caused thereby." (Italics ours)

The assured paid \$1872.68 each year for that coverage.

Under Section 2 of the policy entitled "Third Party Liability" (page 5 hereof), the coverage as to "Property Damage" is:

"Loss from liability imposed by law upon the Assured for damage to or destruction of property * * * caused by *accident*." (Italics ours)

The assured paid \$2370.05 each year for that coverage.

Notice the sweeping language employed. There is nothing here to indicate that loss or damage caused by negligence of the assured was not covered. On the contrary, there is express reference to "accidental loss," and to loss by "accident." Everyone knows that most accidents are the result of some form of negligence.

Notice, too, that there is express reference to “accidental damage” caused by “frost.” From what has been so far stated, and from all that follows in this case, it is clear that the negligence charged by the insurer consisted in taking the plane off with ice on the wings. We shall show later that this charge is not sustained by the evidence. Even if it were, the plaintiffs paid for that very coverage.

Appellees would not contend seriously that the word “frost,” as used in Section 2 of the policy, would not reasonably be construed to include icing. See:

Webster’s International Dictionary, “frost.”
Funk & Wagnall’s New Standard Dictionary,
“frost.”

Aalholm v. A Cargo of Iron Ore (D.C. N.Y.,
1885) 23 Fed. 620.

Such a construction would completely nullify all coverage under Section I, the “Third Party Liability” insuring clause of the policy.

A decision construing General Condition 3 as excluding coverage for negligence under “Section 1, Loss or Damage to Aircraft” would have far-reaching effects upon all policies of aircraft insurance containing similar language. It would also affect insurance policies covering vehicles or any other property where similar language is employed.

Such a decision in effect would read “Section 2, Third Party Liability,” out of the policy.

Section 2 requires the underwriters to indemnify the assured against claims of third parties for damages caused by the insured aircraft and to defend, until they

elect to pay their limit of liability, any claim or suit, whether groundless or not, brought against the assured and in respect to which he is entitled to indemnity under the policy.

Such liability exists only as to damage proximately caused by the negligence of the assured. But the trial court's construction of General Condition 3 absolves the insurer from any obligation to indemnify the assured or defend the third party action if the damage on which the claim is based was caused by the negligence of the assured.

The effect of this is illustrated by the fate of appellants' second claim, which is based upon appellees' refusal to pay or defend against the claim of King County. The county could establish its claim only by proof that Leland's negligence proximately caused the damage to its revetment hangar. Yet the District Court dismissed appellants' second claim on the ground that General Condition 3 relieved appellees from their obligation to pay or defend against the county's claim because the damage was proximately caused by the assured's negligence.

The coverage under Section 2, for which the assured paid \$2,370.05 a year, is purportedly set out in "Schedule 2." It is: public liability, one person \$100,000, one accident \$300,000; property damage \$100,000; passenger liability, one person \$10,000, one accident \$280,000 (R. 43). But if the District Court's construction of the contract is correct, appellees' only actual obligation under Section 2 was to defend groundless claims.

Can it be suggested that any sane person would have

purchased the policy if it had said plainly that that was the kind of coverage he was getting? Or that an honest insurer would have sold him a policy with a provision which it claims had that effect tucked away in an obscure "condition" apparently placed there for another purpose?

Courts consistently effectuate intent and purpose of policy as gained from entire instrument; any ambiguity is resolved against insurer, and absurdity avoided.

It is a dominant principle that an insurance contract will be construed to effectuate the purpose and intent of insurer and insured as gained from the entire policy.

"In determining the intention of the parties to an insurance policy, the policy should be considered and construed as a whole, and if it can reasonably be done, that construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions. Seeming contradictions should be harmonized if reasonably possible. A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent."—29 Am. Jur. 176, *Insurance*, Sec. 160.

"If the intention of the parties can be clearly discovered, the court will give effect to that intention within the sphere of its proper and legal operation and will construe accordingly the terms used in the policy, no matter how inept, ungrammatical, or inaccurate they may appear when

viewed strictly or legally.”—29 Am. Jur. 173, *Insurance*, Sec. 157.

A clumsy arrangement of words will not be allowed to contravene a reasonable construction according to the intention.

Wick v. Western Union Life Ins. Co. (1918)
104 Wash. 129, 175 Pac. 953.

“‘If one construction of an insurance policy would involve hardship or absurdity or contradict its general purpose, this fact is strong evidence that such a construction was not intended by the parties, especially where it is open to a reasonable construction consonant with their general purpose’.”—*Hansen & Rowland v. Fidelity & Deposit Co.* (CCA 9) 72 F.(2d) 151, 155.

“Insurance contracts, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. They should not be so construed as to work a forfeiture of either party’s rights, or to defeat the very object of the contract for which a price has been paid, unless it plainly appears that such was the intention of the contracting parties, and that the effect of the language of the contract was well understood by them when the contract was entered into; and it ought in reason to be a sign to the court that there has been a misapprehension on the part of the contracting party whose rights are thus contracted away that the contract was not understood. Especially is this true in this character of contracts, where the language of the contract is the language of the insurance company

whose duty it is to see to it that, where unreasonable and one-sided provisions are incorporated into a contract, the contract is understandingly entered into.”—*Port Blakely Mill Co. v. Springfield Etc. Ins. Co.*, 59 Wash. 501, 506, 110 Pac. 36, 38.

An insurance policy should not be given a construction that will end in an unreasonable or absurd result or that defeats the manifest intention of the parties and the very object and purpose they had in entering into the contract.

Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N.W. 903.

It is submitted that there is no ambiguity in the policy before us, but if there were, it would be resolved against the insurer, under consistent holdings of the courts.

If a policy will fairly admit of two constructions, the one should be adopted which will indemnify the assured.

Fireman's Fund Ins. Co. v. Globe Nav. Co., (CCA 9) 73 F.2d 611;

Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 205 P.2d 351.

Equivocation and uncertainty, whether in the significance of the terms used or in the form and construction of sentences, are to be resolved in favor of the insured and against the insurer.

Allen v. Berkshire Mut. F. Ins. Co., 105 Vt. 471, 168 Atl. 698, 699.

If the insurer has couched the policy in such terms that a reasonable man could reasonably contend it ap-

plied to and covered a situation for which the insurer is sought to be held liable, the ambiguity will be resolved against the insurer.

Wright v. Aetna L. Ins. Co. (CCA 3, 1926)
10 F.2d 281, 284.

Where a provision in an insurance policy is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.

Kane v. Order of United Com. Travelers, 3
Wn.2d 355, 100 P.2d 1036;

Doke v. United Pac. Ins. Co., 15 Wn.2d 536,
131 P.2d 436.

It is consistently held that conditions, exceptions and exclusions from coverage will be strictly construed against the insurer.

We have seen that, taken as a whole, a policy of insurance is to be construed strictly against the insurer, any ambiguity being resolved in favor of the insured. This principle is applied by the courts most forcefully as to any condition in the policy that might cause a forfeiture of the insured's rights.

“It is a fundamental rule of the law of insurance that a stipulation in a policy which is in the nature of an exception to the liability of the insurer must be construed strictly against it, and that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended. *Canton Ins. Office v. Woodside*, 90 Fed. 301, 33 CCA 63. If the company by the use of an expression found in a

policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. *London Assurance v. Companhia de Moagens*, 167 U.S. 149, 17 Sup.Ct. 785, 42 L.ed. 113; *National Bank v. Insurance Co.*, 95 U.S. 673, 24 L.ed. 565. As said by Mr. Justice Harlan in the latter case:

“ ‘The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself’.”—*Thomas v. Mersey Marine Ins. Co. v. Pacific Creosoting Co.* (CCA 9), 223 Fed. 561, 567.

Provisions limiting liability of the insurer—such as exceptions from coverage, exclusions, restrictions and conditions—are particularly deserving of strict construction so as not to cut down the coverage which the insured believed he was purchasing.

13 Appleman, Insurance Law and Practice,
106, Sec. 7405;

Glen Falls Ins. Co. v. Sherritt, (CCA 4, 1938)
95 F.2d 823.

One reason for this is that insurance policies are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice.

Guarantee Trust Co. v. Continental Life Ins. Co., 159 Wash. 683, 688; 294 Pac. 585, 587.

Negligence of the assured is covered in such a policy unless excluded by clear and explicit language.

It is uniformly held that it is no defense to a suit on a contract of insurance that the loss occurred through the negligence of the assured or his agent, unless the contract expressly makes such negligence a defense.

Rogers v. Aetna Ins. Co., CCA 2, 1899, 95 Fed. 103;

Wheeler v. Globe & Rutgers F. Ins. Co., 1923, 125 S.C. 320, 118 S.E. 609;

Terrien v. Pawtucket Mut. F. Ins. Co., 1950, 96 N.H. 182, 71 A.2d 742.

“An overwhelming percentage of all insurable losses sustained because of fire can be directly traced to some act or acts of negligence. Were it not for the errant human element, the hazards insured against would be greatly diminished. It is in full appreciation of these conditions that the property owner seeks insurance, and it is after painstaking analysis of them that the insurer fixes his premiums and issues the policies. It is in recognition of this practice that the law requires the insurer to assume the risk of the negligence of the insured and permits recovery by an insured whose negligence proximately caused the loss.”

Federal Ins. Co. v. Tamiami Trails Tours, (CCA 5, 1941) 117 F.2d 794, 796.

Insurance policies are taken out to guard against the results of negligence and carelessness.

St. Paul Fire & M. Ins. Co. v. Owen, 69 Kan. 607, 77 Pac. 544.

One of the principal objects which the assured has

in view in effecting insurance is protection against casualties accruing from these causes.

Rogers v. Aetna Ins. Co., supra, 95 Fed. 103.

Mere negligence of the assured in causing a fire or failing to extinguish it will not exonerate an insurer from liability. There must be willfulness in one or the other.

Home Ins. Co. v. Springdale Motor Co., 200 Ark. 893, 141 S.W.2d 522.

It is not a defense that negligence of the assured caused the loss, even though such negligence violated rules and regulations of a state authority.

Central Manufacturer's Mut. Ins. Co. v. Elliott, (CCA 10, 1949)), 177 F.2d 1011.

For a discussion of the origin of this doctrine and its application to policies insuring against perils of both sea and land see *Waters v. The Merchants Louisville Ins. Co.*, 36 U.S. 213, 9 L.ed. 691.

“It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself.”—*Phoenix Ins. Co. v. Erie and Western Trans. Co.*, 117 U.S. 312, 323, 29 L.ed. 873, 879.

The purpose and effect of General Condition 3 is to prescribe the duties of the assured with regard to mitigating loss or damage and ensuring the safety of the insured property in event the aircraft is damaged.

There are at least four reasons, which we will now discuss, why this construction should be adopted.

(1) With this meaning, condition 3 serves a useful and practical purpose, protecting the interests of the insurer without forfeiting the rights of the assured.

By Section 1-A of the policy (page 3 ante) appellees agree, subject to certain exceptions, to pay for or make good accidental loss of or damage to the aircraft while in flight or on the ground or on the water, including its equipment and accessories and including loss or damage by burglary, theft or malicious means. It is common knowledge that aircraft often sustain damage which grounds them in places where they would be subject to further damage from the elements and to loss or damage by burglary, theft or malicious means unless the owner or his agent is diligent in preserving and protecting them.

This interpretation leaves both insuring clauses in effect with coverage of the kind one buying such a policy is entitled to under the rules stated above. At the same time it protects the insurers by requiring the assured to use due diligence in doing everything reasonably practicable to avoid and diminish loss or damage to the insured property in event the aircraft sustains damage covered by the policy. Any breach of that condition would relieve the insurers from their obligations under the policy to the extent they were dam-

aged thereby. It is reasonable to assume that this was appellees' reason for putting Condition 3 in the policy.

(2) *The language of Condition 3 is suited to requiring the assured to mitigate damage but would be inept if its purpose was to exclude coverage for negligence in operating the aircraft.*

Neither the word "negligence" nor any reference to operation of the aircraft appears in the condition.

It is hard to imagine an insurer using the expression "do and concur in doing all things reasonably practicable" in a provision actually prepared for the purpose of requiring the assured to avoid operating the airplane negligently. Reasonable practicality is not a test of negligence nor a justification for negligence or want of due care where they are material factors. The language used in Condition 3 requires action—the doing of everything reasonably practicable. Negligent operation of the airplane could often be best avoided by inaction. The words "do all things practicable" are not suited to prohibiting action. They *are* suited to indicating the degree of care the assured is required to exercise in avoiding loss or damage after the insured property has been placed in jeopardy by damage to the aircraft.

The expression "diminish any loss of or damage to the property" also refers to what an assured would be expected to do after an event which caused loss or damage. One would not be expected to diminish loss or damage until some has occurred. "Avoid" is used with "diminish" and may reasonably be assumed to refer to the same thing—loss or damage to the *damaged* aircraft and its equipment and accessories.

Restricting the application of the verb “avoid” to the same type of damage that is specifically mentioned in other parts of Condition 3 accords with the rule that words of general import should be held to include only things similar in character to those specifically named. That principle is frequently applied in construing conditions, exceptions and exclusions in insurance policies strictly against the insurer and favorably to the assured so as not to cut down the coverage which the assured believed he was buying.

Allen v. Berkshire Mut. Fire Ins. Co., supra,
105 Vt. 471, 168 Atl. 698.

World F. & M. Ins. Co. v. Carolina Mills D. Co., 160 F.2d 826;

Rogers v. Aetna Ins. Co., supra, 95 Fed. 103.

Under no rule of construction could the condition be held to cover damage caused by negligence in operating the aircraft. That would do violence to the language used and defeat the very purpose of the contract. It must be given an interpretation most favorable to the assured. The meaning we have suggested is the one the assured would naturally give to Condition 3.

The language of an insurance policy is to be given the meaning which the one using it apprehended or should have apprehended that the other party would give to it. The common or normal meaning of language will be given to the words employed, unless the circumstances show that in a particular case a special meaning should be attached to them. A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words.

Jack v. Standard Marine Ins. Co., 33 Wn.2d 265, 271, 205 P.2d 351, 354.

(3) The language relied upon to exclude insurance against negligence is in a part of the policy where it would not suggest that meaning to the assured.

The language which appellees claim accomplished the above purpose does not appear in the "General Exclusions" nor among the exceptions and exclusions mentioned in the insuring clauses. Those are the places where one would naturally look to see what risks are covered or excluded.

It is not suggested anywhere in the general exclusions or in the insuring clauses that the policy does not insure against loss or damage caused by the assured's negligence. The language of the insuring clauses clearly includes such coverage. The words relied upon to take it away are part of a sentence constituting one of ten "General Conditions."

Those conditions, taken in order, deal with the airplane's papers and records; mitigating damage and ensuring safety of damaged aircraft and its equipment and accessories in event it sustains damage covered by policy; giving notice and furnishing information and assistance in connection with actual or possible claims; admission of liability by assured; subrogation on claims paid by insurers; bankruptcy or insolvency of assured; liability for rewards offered; voluntary cancellation of policy by either party and refund of premiums; false claims by assured; and policy assignments, waivers or changes. (R. 44)

None of the ten general conditions mentions or refers

to negligence or lack of due care in operating the plane, unless such reference may be inferred from the first part of Condition 3.

One procuring insurance could hardly be expected to search through such material for an inference that might cut down or completely nullify the coverage that was his only object in buying the policy.

(4) *Appellees' construction of Condition 3, which is their entire case, depends upon the location of one word, "AND," in this condition.*

In interpreting a contract words may be transposed to make meaning clear and carry out intent of parties.

Libby, McNeil & Libby v. Busse (1926) 138 Wash. 548, 244 Pac. 963;

Rogers v. Aetna Ins. Co., 95 Fed. 103, *supra*.

We do not think there is any real need for that in this case. General Condition 3, when construed with the policy as a whole, clearly and unequivocally shows that its purpose and intent are not to exclude coverage for the assured's negligence, but to require the assured to mitigate damages and ensure the safety of the insured property in event the airplane sustains damage.

The only thing in the sentence which even suggests any other meaning is the location of the second "and." Any uncertainty or lack of clarity can be completely eliminated by transposing that one word. If we place the "and" after the phrase "in the event of the aircraft sustaining damage covered by this certificate and/or policy," instead of before it, General Condition 3 reads as follows:

"The assured shall use due diligence and do and

concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * * in the event of the aircraft sustaining damage covered by this certificate and/or policy, *and* the assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged aircraft and its equipment and accessories.”

With this slight transposition any ambiguity in the sentence as originally written disappears. The manifest intention of the parties is carried out. The condition has a meaning that is clear, complete and consistent with itself and with all other parts of the policy. It deals with a single subject, accomplishes a legitimate purpose, and protects the interests of the insurers without annulling or limiting the insurance coverage which the assured must have thought, and had a right to assume, he was getting when he bought the policy.

***Rogers v. Aetna Ins. Co., Supra* (CCA 2) 95 Fed. 103,
Applies the Foregoing Principles.**

The case just cited summarizes the principles which apply in this situation better than we could.

The Aetna Insurance Company had insured the owner of a steam tug against such loss or damage as the tug might “become legally liable for from accident caused by collision.” While the policy was in effect the tug collided with a yacht and caused it to sink. Two persons aboard it were drowned. A suit followed in which it was adjudged that the owner of the tug was liable for the collision and the damages and injury resulting therefrom to the extent of his interest in the

tug. He then filed a libel against the insurance company to recover the loss insured by the policy. The policy contained the following:

“Warranted by the assured that the said steam tug, with her tow, shall not go out of the regular and usual channels, and also warranted free from loss, damages, or expense caused by or arising from so doing, or from ignorance on the part of the master and pilot as to any port or place the steam tug may use, or from want of ordinary care or skill.”—*Ibid*, page 105.

It was insisted by the insurance company that there was a breach of the warranty against loss arising “from want of ordinary care or skill.”

In disposing of that contention the Circuit Court of Appeals said:

“It is no defense to a contract of insurance that the loss occurred through the negligence of the assured, or of his servants, unless the contract expressly constitutes such negligence a defense. One of the principal objects which the assured has in view in effecting an insurance is protection against casualties accruing from these causes.

* * *

“The collision undoubtedly occurred through want of ordinary care or skill, and, if it is the meaning of the policy that the insurance company shall not be liable in any such case, the proofs establish a defense. But this warranty is found in a contract which has no other purpose than to indemnify the assured against the loss which he may sustain through the improper navigation of his own vessel, and, as such loss cannot arise in any other way or from any other cause than the want

of skill or care of those in charge, the contract would be of no value to him, and would be nugatory as to the insurance company, if the warranty is given the effect claimed for it. It was probably inserted where it is found with the purpose, on the part of the Aetna Insurance Company, of escaping any liability in the event of a loss, if it should see fit to do so. But it is inserted in a part of the policy where it would not naturally convey that meaning to the assured. It is made part of a comprehensive warranty expressed to exonerate the insurance company against the risks that may intervene, if the tug, with her tow, is taken out of the regular towing channels, or to any port or place where the master or pilot, through ignorance or inexperience, ought not to undertake her navigation. Upon no rule of construction can it be permitted to extend to defeat the whole end and aim of the contract. It must be given an interpretation most favorable to the assured. We construe it as though it read ‘warranted free from loss arising from ignorance or want of ordinary skill or care on the part of the master or pilot as to any port or place the steam tug may use’.”—*Ibid*, page 105.

It seems clear that if appellees had sustained the burden of proving that Leland’s negligence caused the loss, it would be no defense in this case.

II.

Defendants Would Be Liable Even If A Condition Covering Negligence Had Been Written in the Policy.

For purposes of analysis let us assume that a condition covering negligence, which defendants would read into the policy by implication, actually had been set

forth in plain words therein. Let the provision read somewhat as follows:

“The insured, his agent and employees, shall exercise due care in the operation of the insured aircraft, and if the aircraft shall be operated by anyone in a negligent manner the insurer shall not be liable for any loss or damage caused thereby.”

We have noted that coverage for negligence is implied by the use of the words “accident” and “accidental” in both Sections 1 and 2 of the policy. Let us therefore insert an additional provision, in order to eliminate contradiction or ambiguity:

“Wherever the word ‘accident’ or ‘accidental’ occurs in this policy such words shall be deemed to refer to accidents wherein the insured, his agents or employees, or anyone operating the aircraft has been exercising due care to prevent such accident.”

With the foregoing changes made in the policy, it is submitted that defendants still would be liable upon the record presented herein. One reviewing carefully the evidence relating to negligence will observe that the essential facts are uncontroverted. Therefore, no legal principle favoring factual determinations of a trial court presents any barrier to the review of the facts upon their merits by this court.

Where an insurance company seeks to prove non-compliance by the insured with a condition or warranty in a policy, so as to cause a forfeiture of the insured’s rights thereunder, the company must establish such proof by clear and convincing evidence. This is so because of the judicial disfavor of forfeitures of insurance policies, to which we have referred.

* * * “Similarly there must be a preponderance of the evidence on the question whether there has been a breach of warranty or condition such as to justify insurer in forfeiting the policy or defeating a recovery; *and, as a forfeiture is not favored, the facts on which it is based must be strictly proved, and it will not be enforced on mere inference.*” (Italics ours). 46 C.J.S. 514, Insurance, § 1353.

The foregoing quotation applies forcefully to the instant case because the evidence submitted by defendants will be found to turn upon persons' opinions, which upon scrutiny amount to pure speculation. The persons who could give an account of what occurred in the cockpit of the airplane all were killed. They were: Mr. Chavers, the pilot, the co-pilot and Mr. Leland, the insured.

What Was the Cause of the Crash? Insurers Tried But Failed, to Establish It.

It must be kept in mind constantly that defendants alleged negligence as an affirmative defense and undertook the proof of it. They recognized throughout the trial that an indispensable part of such proof was the establishment of the cause of the crash that caused the loss or damage involved herein. Yet a careful reader of the record will see that defendants failed entirely to prove what that cause was.

The only finding made by the trial court on this subject reads as follows:

“IX.

“That William F. Leland, the assured, and the

owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field in that *said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles hanging to its under surfaces*, which conditions materially impaired the lifting qualities of its wings.” (R. 91-92; italics ours)

Notice that this finding is to the effect that the crash was caused by the insured’s attempting a take-off (1) in “dangerous weather conditions” when (2) there was ice on the airplane.

With regard to (1) the weather conditions, the undisputed testimony is: that the weather on the evening of January 2, 1949, was very variable (R. 154). At the time of the crash, 10:07 P.M. (22:07 on the “24 hour clock”) the visibility was one-quarter mile (R. 155). The temperature was freezing, and small ice crystals were forming on objects (R. 154-155). There was ground fog on the field in places but there was no ceiling; that is to say, one could look upward and see the sky and stars without clouds, but with “thin obscuration” (R. 160).

Testimony relating to take-offs safely made from the same runway by other passenger-transport aircraft was excluded by the trial court, as well as a comprehensive

offer of proof on this and related matters. This will be reserved for consideration under a following heading. It is our position, however, that defendants failed to meet the required standard of proof of their affirmative defense of negligence wholly without reference to this testimony and offer of proof which the trial court rejected.

A statement couched in general language that “dangerous weather conditions” existed is not explanatory of the cause of a crash. It is common knowledge that wind, fog or ice very frequently are encountered by aircraft, particularly during winter months, and that any such condition could be regarded as “dangerous” if the aircraft were not operated competently. It is also common knowledge that instruments and equipment are installed in aircraft to meet such conditions, and that thousands of flights proceed safely therein; that planes, like trains, cannot confine their travel to fair weather.

Let us then proceed to the second matter referred to by the trial court in its findings, namely icing.

Left Turn of Plane on Runway Is Unique Feature of Accident, Requiring Explanation.

The defendants relied upon the theory that ice on the airplane caused the crash and the trial court’s finding above referred to is really based upon that view of the accident.

Now, a unique and dominant characteristic of the plane’s behavior just prior to the crash must be kept in mind by anyone offering any theory as to its cause.

The runway at Boeing Field extends generally in a northerly and southerly direction. It is about 7500 feet long (R. 522). The plane commenced its take-off run from the North end. Then, the tracks left on the runway by the plane make it clear that two things occurred: (1) During the first 1000 feet of the take-off run the plane proceeded "in a comparatively straight line" down the center of the runway. (2) *From that point a distance of 800 feet, the plane described a curve to the East, or left of the runway. At a point 1800 feet from the North end of the runway the plane was at the extreme left edge thereof, from which point it became airborne a short distance. It then landed and crashed into the revetment hangar. This revetment is located to the East of the runway and about 5000 feet South from its North end (R. 520-523).*

It is a matter of common knowledge that the pilot of any plane attempts to proceed in a straight line down a runway; that it is dangerous to leave the runway at an angle if for no other reason than risk of collision. Veering to the left edge of the runway is a unique feature of the accident in question. It is obvious that unusual things leading to the crash began to happen *when the veering or turning to the left began*. Consequently, any explanation of the accident must be directed to this dominant feature.

The Testimony of Defendants' Principal Witness, John O. Vineyard, Jr., Relating to Cause of Crash, Narrows Down to Icing.

The principal witness of the defendants on the cause

of the crash was Mr. John O. Vineyard, Jr. On direct examination he testified:

“Q. What do you consider caused the crash?

“A. Weighing all the evidence I have heard, and what I examined myself, I say between pilot proficiency and the icy conditions and possibly the overloading of the air plane that caused the crash” (R. 327-328).

Elsewhere he said further, under examination of his own counsel:

“MR. MATTHEWS: Of these three things which one do you think got the airplane in trouble in the first instance?

“THE WITNESS: It has always been my opinion that the *icy conditions on the airplane did*” (R. 533).

The two matters other than icing referred to in the first of his statements, above, must be disregarded. Testimony to the effect that a cause was “possibly” overloading merits no weight as proof of the actual cause of the accident.

The witness negates “pilot proficiency” as a cause of the crash elsewhere in his testimony. The witness and the pilot of the airplane, Mr. Chavers, had taken their flight training together in 1940, and the witness did not know of any accident in which Mr. Chavers had been involved since that time except the one in this case. He regarded Mr. Chavers’ ability as average. Mr. Chavers’ reputation for dependability, for “the discharge of all his piloting functions,” was “very good.” Also “very good” was his reputation for observance of all duties and regulations (R. 334). As to

Mr. Chavers' reputation for caution the witness testified:

"Q. What was Mr. Chavers' reputation for being a cautious pilot?

A. Very cautious" (R. 334).

The witness testified further as to Mr. Chavers' pilot proficiency:

"Q. Just a word more about Mr. Chavers' pilot proficiency. He had an instrument rating?

A. Yes, sir.

Q. Would you tell the Court just briefly what an instrument rating is?

A. An instrument rating is a rating that is issued by the Civil Aeronautics Administration for proficiency, to establish the proficiency of a pilot flying on actual instrument conditions.

Q. As far as you know, he was certified in every respect as a proficient pilot?

A. As a proficient pilot to his ratings, yes, sir.

Q. And his ratings covered the matter of flying a DC-3 type aircraft?

A. Yes, sir" (R. 338).

Mr. Vineyard Explains, Then Renounces, His Theory That Icing Caused the Crash.

Mr. Vineyard was conscious of the necessity of explaining why the airplane veered to the left on the runway just before commencing flight. In short, he advanced the following theory: The left wing "stalled," because of a larger amount of ice on it than upon the right wing. A plane moving down the runway, then later in flight, is propelled by a force called "lift" which is generated by the flow of air forced by the

propellers over its wings. For this flow to continue effectively, the surface of the wing, particularly the upper surface at the front or "leading" edge, should be smooth. The presence of ice in appreciable quantities would cause a "burbling" or turbulence in the airflow (R. 319-320). If there is "much obstruction" on the wing (R. 319) it would lose its lift or efficiency so as not to fly at a given speed, in which condition it is said to "stall" (R. 320). If the opposite wing, the right in this case, is free of the obstruction it would pull the airplane forward on that side more, causing the plane "to swerve to the left" (R. 321, 328).

This theory assumes (1) that there was ice on the left wing in sufficient quantity to cause it to "stall," and (2) that there was no ice on the right wing sufficient to have that effect; i. e., if both wings stalled there would not have been the turning or veering effect described.

Then notice the clear abandonment by this witness of the theory that the crash was caused by the left wing's stalling:

"Q. You stated a while ago that if there was a good deal more ice on the left than on the right side of the wing, you might have a wing stall?

A. That is right, if there was ice.

Q. But if the ice was equally on the left and right wing, that would not be the case?

A. That is right.

Q. You don't know whether there was more ice on the left than on the right wing, do you?

A. From my knowledge, no sir, because I didn't inspect [200] the top surface of the right wing.

Q. So that you have no knowledge at all as to whether there was more on one than on the other?

A. That is correct'' (R. 338).

With regard to the bottom surfaces of both wings, he had testified only a few minutes previously:

“Q. As far as the bottom side of the wings is concerned, did you notice any difference on either wing?

* * * *

A. No, I would say that they were both pretty well the same [197]'' (R. 335).

Mr. Vineyard Had Not Examined the Airplane Sufficiently to Express Any Opinion on Icing.

Mr. Vineyard went over to the airplane in the dark, while it was parked at the end of the runway prior to take-off. He had no flashlight and did not see the under-surface of either wing at all. What he did was to feel with his hands while standing under the wing. He went over “about 20 inches near the wing tip” in this way (R. 335). He found a “very small icicle, possibly a quarter of an inch, from one-eighth to one-quarter inch long” on the rivets that he touched (R. 316). “This was clear ice caused from water-vapor that has formed on the rivets, which dripped down and froze when it dripped down, caused the icicle” (R. 336). Mr. Vineyard apparently placed no significance upon the presence of these minute icicles.

He did not see or feel the top surface of the right wing (R. 336).

His examination of the top surface of the left wing consisted in looking at it with the aid of what light

was available from a parked automobile (R. 336). Not only Mr. Vineyard but other witnesses of defendants base their opinions upon his testimony as to what he observed of the left wing of the airplane, so it is important to note carefully what he claims to have seen. Under examination by his own counsel he said:

“Q. What did your examination of the top of the left wing disclose?

A. Several *spots* of accumulated ice and heavy frost on the leading sections, up near the leading edge of the left wing, and several *spots* of rough ice along the middle of the wing.

Q. Can you give the Court some idea of the extent and size of these spots, and their condition as to roughness or smoothness?

A. *I can't recall just how large they were, but they were oblong spots, and I don't think I could fairly estimate how big they were, maybe from six inches to eighteen inches; some of them maybe six inches across, some maybe eighteen [177] inches long*” (R. 317).

Notice particularly that in answering this question as to the “extent and size” of the “spots,” the witness states outright that he “can’t recall,” that he could not even “fairly estimate how big they were.” *He uses the word “maybe” three times in referring to their size.*

He does not even refer to the vital point as to how thick, or deep the spots were, i.e., whether a small fraction of an inch or more than that.

We have seen that his theory relating to the stalling of the left wing turned upon their being sizeable quantities of *rough* ice thereon. Yet, when his counsel asked

him, above, to give the court “some idea of the condition as to roughness or smoothness” the witness fails to answer the question at all. He had testified that the ice on the under surface was smooth, not rough (R. 336-337).

The witness continues with his testimony:

“Q. How many spots would you say there were on the top of the left wing in the places you have indicated?

A. *Probably* four or five.

Q. *What percentage of the surface of the left wing would you say was covered, to the best of your judgment, with the spots of rough ice and frost?*

A. That is very hard to put it in percentage, *because I didn't make that close an inspection of how much the ice covered the wing.* From standing on the ground and feeling as far as I could, and from the lights of the car shining up on the wing, I could just see the tops of rough places that I observed. *I did not examine the wing on top like I did on the bottom*” (R. 317, 318).

What does this mean? The witness implies that the inspection he made of the upper surface by means of eyesight was not as good as the one he had made of the lower surface by feeling in the dark. He did not make a sufficiently close inspection, apparently, to say whether the top surface was covered nearer 1% than 100%, despite an inclination to make “maybe” estimates in his earlier testimony, above.

Testimony of Messrs. Miner and Flood as to Presence of Ice.

The person who actually worked on the plane to remove the ice was Mr. Douglas Miner. Mr. Miner was an independent operator of an aircraft maintenance business on Boeing Field who performed services for various operators of aircraft (R. 450-451). He had been engaged by Mr. Leland during the afternoon of the accident to remove the ice and snow from the plane's surfaces. First he washed the plane off with water, finishing about six o'clock P.M. (R. 451).

He began the further operation of washing the plane with alcohol at about 8:30 or 9:00 P.M. (R. 452). He did this work with the help of Mr. Chavers and Mr. Leland (R. 451). *They completed the ice removal only five or ten minutes prior to the plane's taxiing to the runway for take-off.* He used isopropyl alcohol, a liquid that "everybody uses in connection with ice removal." (R. 452). He testified:

"A. We took ordinary floor mops and dipped them in this alcohol and scrubbed the wings with it. That scrubs off the ice already there and makes the surface so that ice won't form on it so readily again [309].

Q. Did you go all over the wings?

A. All over the upper surfaces of the wings and tail surfaces.

Q. Tell us what condition the aircraft was in with respect to presence of ice, if any, when you got through with your operation?

A. *The upper surfaces, as far as I could see, were free from ice. Mr. Leland and Mr. Chavers seemed to be of the same opinion*" (R. 452, 453).

The court ruled that Mr. Miner's reference to Mr. Leland and Mr. Chavers in the last sentence should be stricken. We submit that this was a proper part of Mr. Miner's testimony, especially since defendants, through another witness, had put in issue Mr. Chavers' knowledge of ice on the airplane (R. 352).

The only other testimony relied upon by defendants to establish icing was offered by Mr. Flood.

The vital point may well have been overlooked by the trial court, that Mr. Flood made his observations *before Mr. Miner's removal of ice with alcohol*, as above set forth. He made his observations of the aircraft at about 7:00 o'clock P.M. (R. 186). By about 7:30 he had left the airport (R. 191). Before leaving, he advised the use of isopropyl alcohol to remove ice he had observed on the wings (R. 190). Defendants made much of the circumstance that Mr. Leland rejected this suggestion at that time. Even if this were a fact it would be immaterial if, as is undisputed, Mr. Leland ordered the removal of ice with this alcohol *after Mr. Flood's departure*. As noted in the testimony of Mr. Miner, summarized above, this operation did not commence until about 8:30, about an hour after Mr. Flood left the airport. The testimony of Mr. Miner is undisputed.

Remaining Opinion Testimony of Defendants as to Effect of Ice on an Airplane.

Mr. Flood, who was a pilot for the Flying Tiger Line (R. 197), offered his expert opinion on the effect of the presence of ice on an airplane. His opinion was that the lift of an airplane's wing would be "completely

destroyed," even though there were only "a few specks of frost" thereon. Here is the testimony:

"Q. Even though there were just a few specks of frost, still the lift characteristics of the wings would be completely destroyed?

A. That is correct" (R. 195).

The value of such testimony may be left to the reader's judgment without further comment.

Another witness called by defendants on the matter of icing was Mr. Victor M. Ganzer, an instructor in aerodynamics at the University of Washington and an employee of the National Advisory Committee for Aeronautics (R. 343). He had made tests in wind tunnels concerning the effects of foreign substances such as icing on air foils. Apparently lacking ice itself for test purposes, he had glued carborundum dust to the leading edge of a model wing (R. 345) "in the first ten feet of the wing upon the top surface, on the leading edge" (R. 346). He then placed the model in a wind tunnel for observation (R. 346). He had made no experiments with the DC-3 type of aircraft, involved in this case, and had made no study of the accident at all (R. 355).

The witness was asked to express an opinion upon the basis of facts set forth in a long, hypothetical question (R. 349-351). The assumed facts with respect to icing are drawn from what defendants' counsel supposed that Mr. Vineyard had covered, referred to above. Mr. Ganzer was to assume that "there was an accumulation of rime ice and frost in patches approximately six inches wide and 18 inches long spotted

irregularly across the surface of the left wing” of “an airplane” (R. 349). Notice that Mr. Vineyard had testified at most that there were “probably four or five spots,” not that the spots were “across the surface of the left wing.” We have noted that Mr. Vineyard did not testify whether the ice was “rime,” i.e., rough (rather than smooth) ice; he had not answered that very question put to him by defendants’ counsel (R. 317).

Mr. Ganzer did testify that the existence of minute particles on the rivets on the under surface would not be very serious. He makes this statement even on the assumption, apparently, that such icicles existed on all the rivets rather than upon those within the “20 inches” of the wing that Mr. Vineyard had examined (R. 351-352).

Mr. Ganzer indicated that in his wind-tunnel tests there must be “five or ten per cent of the surface between the leading edge” covered; he regarded this percentage “as a very small portion,” below which adverse effects would not be expected (R. 354). Yet Mr. Vineyard when asked the question as to percentage of ice coverage which he had observed on the insured’s plane had said outright that he did not know. Mr. Ganzer did not indicate the *thickness* of the carborundum in his wind-tunnel tests, nor whether he regarded that circumstance (i.e., whether the ice was a fraction of an inch, or several inches thick) as pertinent.

Mr. Ganzer’s opinion then came down to this:

“When taking off, *if* the pilot tried to take an airplane off at a speed which he was used to taking

that airplane off, *if* he took off by an air speed indicator and *if* he had ice on the wings *and* did not know what the effect of that ice was going to be *and* did take off at that speed *and* pulled the airplane up to take off, he would find that the lift was not sufficient” (R. 352).

It is plain that the opinion of this witness is characterized as much by the number of “ifs” and “ands” as was the testimony of Mr. Vineyard, above, by the number of “maybes.” Again, *there is an absence of factual basis for any of the series of assumptions referred to by the witness.*

The only remaining witness who testified as to the cause of the crash was A. Elliott Merrill. He is a graduate engineer in charge of the flight test section at the Boeing Airplane Company, with considerable experience in the flight characteristics of commercial and military aircraft (R. 357). Counsel for defendants asked an opinion from Mr. Merrill “assuming that the condition of the airplane and the weather was as stated by Mr. Vineyard” (R. 359). Mr. Merrill was also asked to assume the conditions as to “the load” (R. 360); presumably this refers to the overload which Mr. Vineyard testified “possibly” was one of the causes of the crash.

Mr. Merrill’s connection with the accident was confined to sitting in court and hearing such testimony during the course of one afternoon (R. 360).

Mr. Merrill testified:

“Q. Would you be able to formulate an opinion as to the cause of the crash?

A. Yes.

Q. What is your opinion?

A. My opinion is that the airplane never reached a safe flying air speed.

Q. Why did it not?

A. *My opinion there would be that the pilot attempted to fly the airplane at too low an air speed. He did not have a proper air speed to fly the airplane under the existing conditions.*

Q. By the existing conditions, you mean the ice and weather *and the load*?

A. Yes, sir'' (R. 360).

The foregoing statement at most is to the effect that there was an error in pilot judgment, in attempting "to fly the airplane at too low an air-speed." Since Mr. Merrill did not see the airplane take off, his judgment on air-speed would have to be based upon the testimony relating thereto offered by some other witness. Yet no witness in the entire record offered any estimate as to what the air-speed was. Furthermore, it is clear from the foregoing that Mr. Merrill was asked to give his judgment regarding air-speed with relation to the testimony of Mr. Vineyard as to "the ice * * * and the loading." We have seen that neither Mr. Vineyard nor anyone else gave any definite testimony as to what ice there was on the airplane. Under the next sub-heading hereof we shall show that Mr. Vineyard (and all other witnesses of defendants) failed to give any definite testimony on the load, also.

Notice especially that neither here nor anywhere else in the record does Mr. Merrill state that the presence of ice caused the crash. By implication he negates such a theory.

Mr. Merrill was asked specifically, on cross-examination, as to how the presence of ice could account for the plane's veering left off the runway. He testified that even if one assumed a large quantity of ice on the wings, that could not explain the left turn unless it is assumed (which the evidence does not show) that there was appreciably more ice on the left than on the right wing (R. 361-362).

“I would put it this way, the ice on the wing, if it was uniform, would have no effect on rudder effectiveness” (R. 362).

There Was No Proof That There Was Any Overloading.

The suggestion that there was overloading of the plane was made repeatedly by defendants' counsel, in the form of questions put to witnesses and in argument.

Yet no witness offered any opinion that the plane was overloaded or that the crash may have been due to overloading except Mr. Vineyard, who said that this was “possibly” so. The trial court made no finding on this matter.

Furthermore, even if overloading were assumed, there was no showing that it would account for the turning of the aircraft to the left of the runway. On the contrary, Mr. Merrill himself testified in this clear-cut fashion on cross-examination:

“Q. Assuming that a plane was overloaded by two tons, to take an extreme case, would there be anything in that situation that would cause it to lose its right and left directional course if the rudder control were available?

A. No, I don't believe so.

Q. In other words, overloading has nothing to do with keeping a plane on the course of the runway?

A. Generally, no'' (R. 361).

There admittedly were no more than the permitted number of persons aboard the plane. Defendants sought to establish overloading by proving the weight of (1) fuel and (2) baggage aboard.

(1) Defendants attempted to arrive at the weight of fuel aboard at the time of take-off by the following steps:

(a) The pilot, Mr. Chavers, had filed a flight plan for the flight in which he had estimated the hours required for its completion at six (Def.'s Ex. A-14, R. 416).

(b) Although this plan was filed at 6:57 o'clock, about three hours before the take-off (R. 446-447), defendants assumed that Mr. Chavers proceeded in accordance therewith later.

(c) Mr. Vineyard is called upon again to testify that it is common practice among pilots to carry one hundred gallons of fuel for each hour of intended flight. He then rushes in where psychologists fear to tread, giving his expert opinion as follows:

“Q. Have you any opinion as to whether or not he (Chavers) might have had the same idea in mind in filling it (the flight plan) out?

A. Yes, sir. I would say he would say 600 gallons. He would be assured of 600 gallons aboard'' (R. 333).

(d) From the foregoing defendants then would draw

the conclusion that there were 600 gallons of gasoline aboard the plane on take-off. They would establish overloading, and cause a forfeiture of plaintiff's insurance policy, simply by multiplying 600 gallons by the average weight per gallon of gasoline.

Mr. Vineyard himself repudiated such a conclusion. He explained that the number of gallons consumed per hour in a particular engine varied considerably, and that he would not undertake to tell the court that this particular plane did or did not burn a stated number of gallons per hour (R. 340). He said also that he could not tell how much weight there was in the airplane (R. 339). He testified further:

“Q. * * * so that actually there is no basis so far in anything that you have heard in this case, apart from what you have heard in other cases, that would be a basis for any honest, reliable judgment that there was any overloading, isn't that true?

A. The latter part of your statement there, I would like to understand that better, about half-way through your statement.

Q. To simplify it—

A. Did you say this case or any other case?

Q. This case alone [202].

A. That is correct, I haven't” (R. 339-340).

(2) Data as to the weight of the baggage on the plane was not available. However, defendants offered testimony on this point that is noteworthy for its uniqueness if for nothing else. They sought to qualify student passengers on the airplane as experts to testify as to the weight of baggage which they had seen, but had not weighed or even lifted. They were to do this with

no indication of what the baggage contained. The following is a typical question put by defendants' counsel:

“Q. For example, from the size and general appearance of baggage, could you form an opinion as to its probable weight without actually weighing it?

A. Yes, approximately, yes” (R. 379).

There Was No Evidence That Fog Caused the Accident.

Many pages of the record were utilized by defendants for the purpose of showing that there was fog on various parts of Boeing Field on the night in question. Not a single witness, however, testified that in his opinion fog was the cause of the crash. Nor could there be such a witness. Several distinct reasons would make that hypothesis untenable:

(1) The fact is undisputed that the visibility was one-quarter mile at the time of the take-off (R. 155). This would be 1320 feet, or 440 yards. Where would there be a witness who would testify that a pilot could not keep his plane aligned on the runway with that much clear distance ahead? The fact is, that Mr. Chavers kept the plane on the center of the runway for the first 1000 feet (R. 520-521). The presence of fog is no explanation of the plane's turning to the left during the next 800 feet of its travel.

(2) It is the visibility *to the pilot* from where he was ready for take-off that would be important in determining whether restricted visibility had anything to do with the crash. Mr. Miner happened to go up into the cockpit of the airplane “while the passengers were

loading.” He testified as to visibility from that point of observation as follows:

“Q. What was the condition as to visibility at that time?

A. At that time the cockpit was high enough so that you could look over the top of the fog and see lights all over the city and *see the boundary lights on the south end of the field*, see all the lights on the administration building.

Q. The fog then was low-lying ground fog, is that about it?

A. Yes” (R. 454).

Defendants called upon Mr. Vineyard again, to testify that he drove in an automobile with Mr. Miner along the side of the runway just after the take-off and had great difficulty seeing his way (R. 322-327). Such testimony would not contradict that of Mr. Miner, above set forth, because it is common knowledge that the pilot’s cockpit in a D-C airplane, or in any other transport airplane, is some feet higher above the ground than the driver’s seat in an automobile.

It is to be noted that Mr. Vineyard was asked the question, “What do you consider caused the crash?” immediately after his description of fog and visibility conditions (R. 327). It is very clear from his answer, to which we have referred above, that he himself eliminated fog as a causal factor when he said: “Weighing all the evidence that I have heard, and what I examined myself, I say between pilot proficiency and the icing conditions and possibly the overloading of the airplane that caused the crash” (R. 327-328).

The weather observer called by defendants explained

that her observation of visibility as "one-fourth mile" was made *from the Control Tower*, and that she "did not know what the condition was as to visibility from the north end of the runway looking south" (R. 154).

Mr. Robert H. Wiley, the Airport Traffic Controller (R. 163), confirmed this. He testified that in the performance of his duties he had found it not unusual that a pilot could see the full length of the runway at times when visibility was restricted in the tower. He explained that Boeing Field is peculiar in this respect, because of special fog and contour conditions there (R. 167, 168, 169).

(3) Even if it were assumed that there was so much fog on the take-off that the pilot could not see the ground, there is no testimony that would support the conclusion that the take-off under those conditions would not be safe. Mr. Chavers was a properly certificated instrument pilot, and held a valid rating for instrument take-off in the particular type of aircraft he was flying (R. 338). Richard R. Crooks, a captain employed by United Air Lines, with wide experience (R. 469-470) defined an instrument take-off as one "entirely by instruments" with no visual reference to the ground (R. 470-471). He testified:

"Q. Assuming that a pilot is proficient in instrument procedure, is an instrument take-off a safe procedure?

A. I would say it would be as safe as a normal take-off" (R. 472-473).

It is true that his particular company had a rule in effect prohibiting instrument take-offs when passen-

gers were aboard, but such a circumstance does not affect the foregoing testimony, which was undisputed.

The Evidence Supported Alternate Possible Causes of the Crash, Which Were Not Excluded by Defendants.

The form of the hypothetical questions put to witnesses by defendants' counsel had the effect of excluding automatically alternative possible causes of the crash. The questions were couched in such terms that the proper functioning of engines, instruments and accessories was to be taken for granted by the witness. Typical is the question put to Mr. Merrill, whose only connection with the crash was sitting in the courtroom the previous afternoon (R. 360):

“Q. Assuming the facts assumed in my previous question with respect to the weather and condition of the airplane; and assuming that during the attempted take-off the motors of the airplane sounded as though they were operating normally; and that after the crash and fire of the airplane the motors, propellers and instruments were inspected and no evidence of mechanical failure found: Would you be able to formulate an opinion as to the cause of the crash?” (R. 359-360).

The assumption “that after the crash and fire of the airplane the motors, propellers and instruments were inspected and no evidence of mechanical failure found” was based solely upon the testimony of Mr. Richard Davis. He was the aircraft engine mechanic, called as an expert witness by defendants, who disassembled the engines and made the inspection referred to by defendants' counsel in this question (R. 198-199). On cross-examination Mr. Davis testified:

“Q. You referred to the remains of the engines. I took it from that you meant that they were subject to a considerable state of destruction at the time you made your inspection, is that true?

A. Yes, I would say *they were in a considerable state of destruction.*

Q. So that *all you could do was to take the remains of the engines as they were made available to you and do your best on that basis?*

A. That is correct.

Q. So that considering there had been a fire and consequent destruction, *is it not the case that there may have been many things happening to the engines, whatever kind, that wouldn't be available to you by way of evidence when you [73] saw the remains?*

A. I might answer that this way: *externally the engines were considerably destroyed, along with most of the accessories*” (R. 203).

On cross-examination, Mr. A. Elliott Merrill testified that there might be one of several causes that would cause the airplane to veer to the left on the runway, having nothing whatever to do with negligence on the part of the pilot. Some of these alternative, possible causes, are:

(1) The engines might be functioning normally, but the “governor” regulating the speed of any one of the propellers might fail on take-off, which would cause a particular propeller to turn faster than normal. If this happened on the right side of the airplane, the propeller there would cause the plane to turn left, because it would exert more pull on the right wing than on the left (R. 364).

(2) If the take-off was made by instruments, rather than by visual reference to the ground, the failure of any one of several directional instruments might cause the observed turning (R. 366).

(3) If the take-off was made with reference to visual runway conditions, the failure of the windshield swipes or other equipment could cause serious trouble in the pilot's keeping direction (R. 366).

Mr. Merrill testified further that failure because of "metal fatigue" can occur at unpredictable moments even immediately after inspections; that this happened "occasionally" (R. 366-367). He said, further, that the more complex a mechanism, such as airplane, is, the more likely this is to occur (R. 367).

He did testify that in forming his opinion, referred to above, as to the cause of the crash, he "considered the possibility of all those things happening" (R. 367). However, his consideration of such possibilities was based upon the assumptions he was asked to make in the question he was to answer above, namely, that other witnesses had made proper examinations of engines, propellers, accessories and other items and found that nothing about them had caused the accident.

Any Finding of Negligence Must Be Based Upon "*Res Ipsa Loquitur*."

From the foregoing it is evident that whatever the cause of the crash was, its nature was not established by the evidence. The only basis for a finding of negligence would have to come from an application of the doctrine of *Res Ipsa Loquitur*.

This was the conclusion of the Superior Court of King County in the action brought by King County against the insured for damage to the County's revetment in the crash. The court there said in its memorandum opinion:

"Plaintiff contends that the take-off constituted negligence after Vineyard had given his opinion that such an attempt was unsafe. It is to be remembered that the other two planes, at or about the same time, safely made their flights. Whether the swerving of the plane was due to ice upon the wings is in my opinion speculative. It therefore follows that for the plaintiff to prevail, it must do so upon the doctrine of *res ipsa loquitur* (R. 134).

* * *

"Passenger planes by the hundreds and thousands daily take off from fields such as this. Accidents frequently occur in the air, to which accidents the doctrine of *res ipsa loquitur* may or may not be applicable. Certainly the veering of the plane from the runway is an accident which normally and ordinarily does not occur unless there is a mechanical failure or a human failure, and when the accident and the circumstances attending it could not well have happened without negligence, a presumption of negligence on the part of the operator arises from the proof of such facts" (R. 134-135).

Would respondents contend an insurer may meet the burden of proving its affirmative defense of negligence simply by invoking the doctrine of *res ipsa loquitur*? We believe this position is so untenable that respondents themselves would not try to take it. If they do, we request only that they say so in explicit

terms, in which event a reply on this point will be offered.

III.

The Trial Court Erred in Excluding Evidence and Rejecting Plaintiffs' Offer of Proof Relating to Weather and Air Traffic Conditions.

We think that what has been said so far is amply sufficient to justify reversal of the trial court's judgment. We prefer to rely on the foregoing, to justify a reversal, rather than to invite any undue emphasis upon the following, which we believe would call for a new trial.

Remembering that the bulk of defendants' defense related to alleged weather and icing conditions, one must recognize the materiality of the following question put by plaintiffs upon cross-examination to Mr. Robert Wiley, the Airport Traffic Controller at Boeing Field:

“Q. Mr. Wiley, what other transport aircraft, if any, took off from Boeing Field within a period of approximately half an hour prior to the accident in question?” (R. 176).

The trial court acknowledged that the question was material, stating that “the conditions of flight as affecting safety of take-off of the plane in question at or about the time it attempted to take off are material” (R. 177).

Mr. Wiley, however, used certain notes while being cross-examined by plaintiffs. Defendants objected to his doing so, either on the ground that the notes were improper or that the particular use made of them by

the witness was (R. 177-178). This objection was sustained by the court (R. 179). Counsel for plaintiffs then stated that

“In deference to the court’s ruling we will defer further questions of this witness until we have had an opportunity of checking further on the notes” (R. 179).

Thereupon the court directed that the witness be excused from the stand, but that he should “remain in attendance until later excused” (R. 179), which was not done until the conclusion of the trial.

After the defendants had put on their case plaintiffs called Mr. Wiley back to the stand and asked the same question as that above set forth (R. 465-466). Objection was made to the question and sustained by the court. It is abundantly clear from the remarks of the court and the colloquy between court and counsel that the court’s basis for excluding this testimony was that it was not proper rebuttal—that the testimony should have been introduced by the plaintiffs as a continuation of their cross-examination, if not as a part of their case in chief (R. 465-469; 479-487).

Negligence on the part of the insured being an affirmative defense interposed by defendants, it was not incumbent upon plaintiffs to disprove negligence unless or until defendants introduced evidence in proof of it. Plaintiffs might have withheld any cross-examination of Mr. Wiley, then called him or someone else as their witness on rebuttal. In either case, it was only on rebuttal that plaintiffs could introduce their evidence on the issue of negligence.

Any argument such as that made by defendants to the trial court (R. 480-482), to the effect that defendants had excused their witnesses before Mr. Wiley was called back on rebuttal, is beside the point. Defendants knew that the court had excused Mr. Wiley from the stand and explicitly directed that he remain in court until excused (R. 179), which could be only for the purpose of enabling plaintiffs to submit further testimony through him. Plaintiffs could have called someone else besides Mr. Wiley on rebuttal, covering the same subject matter. Is it unfair that plaintiffs recalled one of defendants' witnesses instead, or were plaintiffs under some duty to forewarn defendants of such an intention so that defendants could retain in court persons to refute their own witness by surrebuttal?

Upon the court's sustaining the objection to such testimony, noted above, plaintiffs made the offer of proof set forth below. This is so clearly pertinent to the issues involved that it was prejudicial error for the trial court to reject this offer:

"We offer to prove by the witness Robert Wiley that during the period of one-half hour immediately preceding the accident in question, several scheduled and non-scheduled passenger aircraft took off from the north end of the runway at Boeing Field under conditions of safe operation.

"We offer to prove by the witness Crooks that about 9:35 he, as a captain on one of the United Air Lines' planes, took off from the north end of the runway at Boeing Field; that the runway surface at that time was not unusually icy; that he could apply brakes on the plane even while the

motor was being run up prior to take-off without substantial slipping or skidding; that he could see the lights along both sides of the runway [343] clearly on down either to the end or substantially to the end of the runway; that he made a contact take-off, not an instrument take-off, and that the take-off was made without any unusual difficulty and with complete safety. We offer to corroborate that evidence by the co-pilot, Mr. Popham.

“We offer to prove by the witness Strobel that as captain on an Air Transport Command aircraft, just a few minutes after the United flight, mentioned, that he took off from the north end of the runway and found substantially the same conditions as were summarized and observed by Mr. Crooks” (R. 482-483).

* * * *

“We offer further to prove by the witness Robert Wiley that immediately prior to the take-off of the aircraft involved in this accident, that he was in the tower and while in charge of giving clearance for take-off to this and other aircraft, he was in direct communication with Chavers as the pilot of the aircraft involved in the suit, that substantially the following occurred in respect of the clearance for take-off” (R. 484).

* * * *

“That substantially the following occurred [345] which Mr. Wiley is prepared to testify from his own notes without reference to the CAB hearing: that after the tower, that is, after Mr. Wiley had informed him, Chavers, that he, Chavers, would be advised of any change of visibility, the pilot acknowledged that statement and said in substance that he, Chavers, could see the green range lights at the other end of the runway, meaning the

opposite or south end of the runway approximately five thousand or more feet away” (R. 484).

* * * *

“We offer to prove then that he, Wiley, in reply to that report concerning the range lights at the opposite end of the runway stated in effect that the visibility was improving; that he, Chavers, in reply reported to the tower that he, Chavers, could still see the green lights at the opposite, meaning the south end of the runway, and that he was going to take off; that the tower, in response to that, said in effect that he was cleared for take-off and that the pilot should report when he got on top” (R. 485).

CONCLUSION

It Is Submitted That the Holding of the Trial Court Should Be Reversed with Directions That Plaintiffs Have Judgment for the Amounts Asked in the Amended Complaint, Including Interest at 6% from Date of Loss and Costs

Since the trial court allowed plaintiffs no recovery, it did not pass upon the question of interest. We respectfully suggest that this be decided here so the entire controversy may be finally disposed of.

(11 With regard to appellants' first claim:

We thing appellees will not question the fact that if appellants are entitled to prevail the principal amount due them is \$20,054.47. This is computed as follows: Agreed value of aircraft, \$25,000.00. Less: Paid to United States under Endorsement No. 6, \$3,305.33; salvage, \$390.20; deductible under policy, \$1,250.00; total deductions, \$4,945.53. Balance due, \$20,054.47 (R. 29, 30).

The date of the loss was January 2, 1949.

There is no provision in the policy extending or otherwise fixing the time of payment.

The Washington State statute provides that every loan or forbearance of money, goods or thing in action shall bear interest at the rate of six per cent per annum where no different rate is agreed to in writing between the parties.

Rem. Rev. Stat., § 7299.

Plaintiffs are entitled to interest at the statutory rate from the date the indebtedness became due.

Concordia Ins. Co. v. School Dist. (C.C.A. 10)
282 U.S. 545, 75 L.ed. 528, affirming 40 F.2d
379;

Jacobson v. Farmers Mut. F. Ins. Co. of Turlock, 5 Cal. App.2d 1, 40 P.2d 960;

Aetna Ins. Co. v. Soloman, 172 Ark. 169, 287
S.W. 1000.

Where there is no provision in the policy extending or otherwise fixing the time of payment or where, although there is such a provision, the insurer has waived it by denying liability *in toto*, interest runs from the date of the loss.

John Conlon Coal Co. v. Westchester Fire Ins. Co., 16 F.Supp. 93, 97. Affirmed (C.C.A. 3)
92 F.2d 160. Certiorari denied, 302 U.S.
751, 82 L.ed. 581;

J. Purdy Cope Hotels Co. v. Fidelity Phoenix Fire Ins. Co., 126 Pa. Super. 260, 191 A. 636;

Olson v. Herman Farmers' Mut. Ins. Co., 187
Wis. 15, 203 N.W. 743;

Home Insurance Company of New York v. Roll, 187 Ky. 31, 218 S.W. 471, 474;

Jensen v. Palatine Insurance Company, 81 Neb. 523, 115 N.W. 286.

(2) With respect to appellants' second claim:

The judgment in favor of King County was entered on October 9, 1950 for \$2,566.70 and costs (R. 131). By the terms of Section 2, Subdivision 2, appellees agree to pay these costs and interest accruing on the judgment after entry thereof (page ante).

Appellants are entitled to reasonable attorneys' fees and expenses incurred in defending the King County suit.

Shafer v. United States Casualty Co., 90 Wash. 687, 156 Pac. 861.

It was stipulated that if appellants are entitled to such fees \$500 shall be the amount allowed (R. 67). Appellants incurred \$34.90 expense in defending the action (R. 136).

Respectfully submitted,

J. CHARLES DENNIS

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United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as
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for Atlantic and Pacific Airlines, *Appellants,*

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED; ORION
INSURANCE COMPANY, LIMITED; THE DRAKE INSUR-
ANCE COMPANY, LIMITED, subscribing underwriting
members of Lloyd's, London, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF OF APPELLEES

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812 Hoge Building,
Seattle 4, Washington.

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For the Ninth Circuit

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Appellees.

No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF THE CASE

On January 2, 1949, a DC-3 airplane loaded with a group of 27 Yale students who intended to return to school from their Christmas holidays, and three crew members, crashed in attempting to take off from Boeing Field in Seattle, Washington, at 10:07 P.M. The owner of the airplane, who was operating it as a non-scheduled air carrier, the pilot, co-pilot and eleven of the students were killed in the crash, and most of the other students seriously injured.

The owner had a certificate of insurance with appellees which, when given its plain and intended meaning, insured him against accidental damage to his airplane, caused without his negligence and while he was operating the airplane within the Civil Aeronautics Authority limitations upon it, and against the claims of third parties while he was operating it within the Civil Aeronautics Authority limitations upon it. The Administrator of the owner's estate and other parties, whose rights are derivative from and no greater than those of the owner, brought suit on the certificate to recover for the damage to the airplane and property of a third party caused by the crash. The District Court found that the appellants were not entitled to recover under the clear and explicit terms of the certificate because of the assured's negligence and dismissed their action.

Pertinent Certificate Provisions

Displayed prominently on the face of, and at the beginning of the certificate or policy is the following provision:

“in consideration of the premium and the statements contained in the Schedule the Underwriters do hereby agree to insure the Assured named in the Schedule against Accident, Loss, Damage and/or Liability, *subject to the terms, conditions and limitations contained herein or endorsed hereon*, as hereinafter set forth in respect of Aircraft described in the Schedule, occurring during the term of this Certificate and/or Policy.” (Italics ours)

The “General Conditions” of the certificate are on the same page as the “terms” of the certificate quoted

by appellants. They are displayed as prominently thereon as any other part of the certificate, and are in part as follows:

“(1) At the commencement of each flight the Aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority. * * *

“(2) The Aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the Aircraft.

“(3) The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories.”

District Court's Findings

Findings of Fact VIII, IX, X and XI, as made by the District Court, are as follows:

“That on January 2, 1949, at Boeing Field, Seattle, Washington, William F. Leland, the assured named in said policy, caused the acting pilot of said insured airplane to attempt to take said airplane off in flight from said field; that in said attempted take-off, said airplane became partially airborne and thereafter crashed, causing the death of said assured, William F. Leland, the pilot, copilot, and a number of the passengers aboard said airplane; that in said attempted take-off, said airplane struck a revetment hanger owned by King County causing damage thereto and that said air-

craft was wrecked and except for small salvage was totally destroyed.

“IX. That William F. Leland, the assured, and the owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field in that said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles hanging to its under surfaces, which conditions materially impaired the lifting qualities of its wings. That each and all of said conditions made it extremely unsafe to attempt to fly said aircraft, and as to all of said conditions the said assured owner personally was forwarned and had or should have had personal knowledge thereof.

“X. That all damage caused in said crash to said insured airplane and the revetment hangar located on Boeing Field which said airplane struck at the time of said crash, was proximately caused by the negligence of said Leland and by the failure of said Leland to use due diligence in the operation of said airplane as hereinabove set forth.

“XI. That in operating said airplane in the manner and under the conditions set forth above, the assured violated the express terms and conditions of said contract of insurance.”

ARGUMENT IN SUPPORT OF JUDGMENT

The Evidence Is Virtually Uncontradicted and Overwhelmingly Establishes That the Assured Violated the Three Conditions of His Policy of Insurance Above Quoted.

Summary

The evidence conclusively establishes that the assured attempted to take off in his airplane when the weather conditions were such that the law prohibited the take-off. Because of fog, the visibility as reported by the weather bureau at the airport from which the plane attempted to take off was only one-fourth the distance of the minimum required by law for any kind of take-off. The temperature was freezing and the runway was covered with a sheet of ice. Ice crystals were floating in the air for twenty-one minutes prior to the attempted take-off. The record abundantly shows that the assured with a wanton and wilful disregard of likely consequences recklessly attempted to take off when his airplane had an accumulation of ice, snow and frost on the upper surfaces of its wings and fuselage and icicles hanging from the under surfaces of its wings and with a load, without figuring in the weight of the ice and snow, of approximately *28 per cent* in excess of the load it was permitted by law to carry.

The weather at Boeing Field on January 2, 1949, the day of the crash, is shown by defendants' Exhibit A-3, which is a certified copy of the records of the United States Weather Bureau Station at Boeing Field for that day (R. 143-144-145), and the testimony of the employees of the Weather Bureau, Dorothy Sawyer (R. 141 to 156) and Edward Meredith (R. 156 to 162)

stationed at the airport. The temperature was below freezing that day until 12:28 P.M., was slightly above freezing from then until 5:27 P.M., and below freezing thereafter. It was foggy in the morning from 6:00 A. M. until 10:26 A.M., and again in the evening from 6:25 P.M. until midnight. It snowed between 3:58 P.M. and 5:01 P.M. There were ice crystals floating in the air between 9:46 P.M. and 10:18 P.M. Visibility as reported by the Weather Bureau, was $\frac{1}{8}$ mile at 9:46 P. M. and 9:58 P.M. and was $\frac{1}{4}$ mile at 10:04 P.M. and at the time of the crash at 10:07 P.M. There was ice on the metal hand rail and steps outside the weather observers' room (R. 151) and ice was forming on other objects (R. 154-155).

From evidence given by passengers on the plane who survived, it appears that the runway on which the take-off was attempted was covered with a sheet of ice (R. 338-399).

In addition to the evidence concerning visibility in the Weather Bureau report, witnesses, including an observer in the airplane, testified that visibility on the runway itself, from the point of the attempted take-off, was very limited (R. 324 to 326-392).

Sec. 42.36 of Title 14, 1949 Ed., C.F.R., applicable to the assured's operations provides:

"Weather minimums; take-off. No flight shall be started when the ceiling or visibility at the point of departure is less than:

(a) *Contact (visual) flight operations (CFR-VFR):*

- (1) Day. Ceiling 1,000 feet, visibility 1 mile.
- (2) Night. Ceiling 1,000 feet, visibility 2 miles.

(b) *Instrument flight operations (IFR)*: The minimums specified in the CAA Flight Information Manual, or as otherwise specified or authorized by the Administrator. In no case shall the ceiling be less than 300 feet or the visibility less than 1 mile.”

Sec. 60.79 of Title 14, 1949 Ed., C.F.R. defines “Ground Visibility” as used in the Regulations as follows:

“*Ground visibility.* The average range of vision in the vicinity of an airport as reported by the U. S. Weather Bureau or, if unavailable, by an accredited observer.”

49 U.S.C.A. Sec. 560, as in effect at the time of the accident, provides in part as follows:

“(a) It shall be unlawful —

“(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

* * * * *

“(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Board or Administrator of Civil Aeronautics under this subchapter.”

When these regulations and this statute are applied to the evidence concerning visibility as reported by the weather bureau, it *conclusively appears* that the assured’s attempted take-off was made in violation of the law. This violation of law constituted *negligence per se*.

McCoy v. Courtney, 25 Wn.(2d) 956, 172 P.(2d) 596.

It appears from the evidence that the assured's airplane had been standing out in the open unprotected for several days prior to the attempted take-off and that though the assured had wing covers they had not been put on the plane (R. 456). After the snow fall during the late afternoon of January 2, 1949, the plane had at least three inches of snow on it (R. 456). Between 5:30 and 6:00 P.M. and while the temperature was below freezing, the assured had his maintenance man, Mr. Miner, make an attempt to wash the snow off the wings and tail surfaces of the plane with a high pressure hose (R. 451) using cold water (R. 456).

After this attempt at washing the snow off the airplane and at approximately 7:00 P.M., Emmett Flood, an experienced pilot who had been called by the assured to act as a member of the flight crew (R. 185 to 186), arrived at the airport and inspected the airplane. He testified that the plane then had an accumulation of ice and frozen slush on both the top and under surfaces of the wings and four to five inches of snow on the top of the fuselage (R. 186). He said that water had seeped to the under surfaces of the wings and there were icicles hanging from them (R. 186 to 187). Mr. Flood advised the assured, Leland, that he did not think the plane was in a safe condition to fly (R. 190) and after Leland said, "It don't look like too much ice to me," Flood refused to fly the plane (R. 185-191). About 8:30 or 9:00 P.M. (R. 452) the assured had Mr. Miner, who had hosed the plane and who testified he had no previous experience in removing ice from an airplane (R. 454), take 7½ gallons of alcohol (R. 458), dampen floor mops in it and go over

the upper surfaces of the wings. None of the alcohol was applied to the under surfaces of the wings (R. 458). No attempt was made at any time to remove the ice and snow from the fuselage of the plane (R. 460).

A number of witnesses inspected the plane just prior to the attempted take-off and testified as to its condition with respect to ice at that time. John O. Vineyard, Jr., a friend of Mr. Chavers, who was to pilot the plane, and a pilot who himself had a great amount of experience, went to the airport at the request of Chavers and inspected the airplane in the presence of the assured and in the condition it was in at the time of the attempted take-off (R. 321). He testified that just about every rivet on the under surfaces of the wings had an icicle from $\frac{1}{8}$ to $\frac{1}{4}$ inch long hanging from it and that there were a great many rivets (R. 316 to 317). He did not examine the upper surface of the right wing but did that of the left wing (R. 317) and testified that there were several spots of accumulated ice and heavy frost up to six inches across and eighteen inches long near the leading edge of the wing and several more along the middle of the wing (R. 317). He told Chavers he did not think the plane was in a safe condition to fly (R. 318 to 319).

John W. Kendall, Jr., a passenger on the plane who survived, noticed a sheet of ice on the top surfaces of the wings and the stabilizer and elevator. He moved the elevator up and down and heard ice crackling. He also noticed bumps of ice on the under surfaces of the wings (R. 382).

Donald F. Lynch, another passenger on the plane who survived, noticed there was ice on the fuselage,

bumps of ice on the under surface of the left wing and a sheet of ice on the upper surface of the left wing and that the deicers were covered with a thin sheet of ice (R. 311).

James Wendell Smith, another passenger, observed that the plane was covered with a thin sheet of ice and that there were pieces of ice hanging down from the wings. Some of the ice was near the leading edge of the wing according to Smith, and he saw Charles Belknap chip off a piece of the ice that was hanging down from the wing (R. 398 to 399). He further testified that the prior attempts to remove the ice had been quite meager (R. 399).

Charles S. Belknap, another passenger, testified that he ran his hand along the aileron of the left wing and found ice, like beginning icicles, and chipped a piece off. He said the ice on the wings was not a uniform layer, but that there were chunks and patches of ice on the wings, some of which was immediately behind the leading edge of the wings (R. 402-403).

To rebut the testimony of these many observers as to the condition of the airplane, the appellants offered only one witness who testified concerning the ice on the airplane. This was the witness, Miner, the assured's employee, who attempted to remove it. In his testimony he concedes that there were streams of ice left on the under surfaces of the wings (R. 453) and his testimony concerning the upper surfaces was quite equivocal, his statement concerning them being that the upper surfaces "as far as he could see" were free of ice (R. 453). He further testified that no attempt

was made to remove the ice and snow from the fuselage of the plane (R. 460). He admitted the snow and ice on the fuselage was three inches thick (R. 456).

The evidence concerning the overloading of the airplane is not, in any manner, contradicted. The appellants admitted, pursuant to appellee's request therefor (R. 20-53) that the assured's airplane was licensed under Department of Commerce, Civil Aeronautics Authority, Certificate of Airworthiness, Form ACA 1362, which provides:

"This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the Civil Aeronautics Authority regulations."

Appellants also admitted (R. 21-53) that under the "Operation Limitations" prescribed on Form ACA-309a by the Civil Aeronautics Authority for the assured's airplane the maximum permitted take-off weight for said airplane, when carrying passengers, was 25,346 pounds. They further admitted (R. 21-53) that the dry weight of the assured's airplane at the time of the attempted take-off, without passengers, baggage, gasoline or lubricating oil, was 17,696 pounds. This means that the *maximum load* which the assured was permitted by law to carry on his airplane, including fuel, was 7,650 pounds.

Under Title 14, 1949 Ed., C.F.R. Secs. 4a.738-T and 4a.771, standard values are required to be used in determining whether the certificated take-off weight of an airplane is exceeded. These weights, as

prescribed by the latter section are: gasoline — 6 pounds per gallon; lubricating oil—7.5 pounds per gallon, and crew and passengers 170 pounds per person.

Appellants admitted (R. 21-53) that there were thirty persons, including passengers and crew members, aboard the assured's plane at the time of the attempted take-off. Thus, for the purpose of determining whether the take-off weight was exceeded by the assured, the crew and passengers weighed *5,100 pounds*.

The undisputed evidence shows that there were 600 gallons of gasoline on board at the time of the attempted take-off (R. 22-54-329 to 333). Computed as prescribed by the regulation, this weighed *3,600 pounds*.

The lubricating oil tanks on the plane had a capacity of 58 gallons (R. 464) and of course, had some oil in them but the exact amount at the time of the attempted take-off is not shown. The plane was taking off for a flight from Seattle, Washington, to New Haven, Connecticut, and the first point at which it intended to land according to the flight plan (R. 22-54) was Billings, Montana, which the court may judicially notice is 737 air miles from Seattle.

Without taking lubricating oil or baggage or the ice and snow on the plane into consideration, the plane is shown to have a load of *8,700 pounds* and to be loaded *1,050 pounds* beyond its maximum permitted take-off load of *7,650 pounds*.

A number of passengers who survived gave evidence on the weight of the baggage. Among the per-

sons so testifying were the two passengers who *loaded the baggage on the plane*. James W. Smith testified (R. 397) that he helped load the baggage—that the baggage compartment was completely filled up—the back part of the plane was filled up and the excess baggage put in the pilot's compartment. He testified that his own baggage weighed 100 pounds and that the average weight of the baggage of all passengers was 60 to 65 pounds per passenger. George M. Cole testified that he helped load the baggage on the plane (R. 386) and estimated that it exceeded the forty pounds per person limit that the passengers were supposed to have and that a number of the bags weighed over fifty pounds.

John W. Kendall, Jr., who had worked for an airline handling baggage, estimated (R. 381) that a majority of the baggage exceeded fifty pounds in weight.

The lowest estimate was thus that the baggage weighed *over* forty pounds per person. Figuring it at forty pounds per passenger, the baggage weighed *1,080 pounds*.

The gasoline, crew and passengers, and baggage, thus weighed at least *9,780 pounds, or 2,130 pounds* more than the 7,650 pounds the plane was permitted to carry. The load is thus shown by undisputed evidence to be approximately *28 per cent* more than the assured was allowed by law to carry without considering the ice and snow on the plane or the lubricating oil. Taking off with such a load also constituted *negligence per se*. 49 U.S.C.A. 560.

Summarized, the evidence on overloading is as follows:

Maximum lawful load 7,650 lbs.

Actual load

30 passengers and crew

—30 x 1705,100 lbs.

600 gals. gasoline—600x6..3,600

Baggage—*over* 40 lbs. per

person 40 x 271,080

Lubricating oil—amount

not shown

Ice and snow—weight

not shown

At least.....9,780 lbs.

Load in excess of lawful

load*At least* 2,130 lbs.

A number of experts testified concerning the effect of ice on an airplane and gave their opinions as to the cause of the crash, based on the evidence in the case.

Emmett Flood, an experienced pilot, testified (R. 194 to 197) that an accumulation of frost or ice on the wings of an airplane will destroy the lifting characteristics of the wings and cause them to stall. He stated that this was very, very dangerous in take-off and that, in his experience as a pilot he had found that a *very small amount of frost* will cause difficulty in taking off.

John O. Vineyard, Jr., a thoroughly experienced pilot, testified (R. 319 to 320) that ice or frost on a wing spoils the smooth airflow over the wing and causes a burbling effect in the air which decreases the lift of the wing and makes it stall or quit flying. He

testified (R. 328) that there was enough ice on the left wing (he did not examine the upper surface of the right wing) to materially affect the lifting qualities of the wing. He further testified (R. 327 to 328) that the attempted take-off was a very hazardous operation and that, in his opinion, the icing conditions, overloading and pilot proficiency caused the crash. He explained this further (R. 531 to 533) by testifying that it was his opinion that the ice on the plane got it into trouble in the first instance and that by pilot proficiency he meant that an especially expert or proficient pilot might have been able to get it out of that trouble.

Victor M. Ganzer, a professor of aeronautical engineering, teaching aerodynamics at the University of Washington, testified (R. 346 to 347) that foreign particles on the upper surface of a wing reduces its lifting qualities to a marked extent at take-off; that the greater the plane's load the faster it would have to go in order to take off safely (R. 348) and that icicles on the under surface of a plane's wings would increase the drag (R. 351 to 352). He further testified that the amount of ice, as described in the testimony as being on the assured's airplane would have a *very serious effect on the characteristics of the airplane* during take-off (R. 352-353). He also testified (R. 354) that a very small portion of foreign substance—as little as five per cent to ten percent of the surface of the leading edge of a wing would have a serious effect.

A. Elliott Merrill, a graduate engineer, in charge of all flight testing for the Boeing Airplane Company in Seattle for the past ten years, testified (R. 358) that ice on the wing of an airplane spoils the flight char-

acteristics of the wing by disrupting the smooth air flow under or over the wing—that it reduces the lift of the wing and causes it to stall—that it is more serious at take-off than in subsequent flight. He testified (R. 359) that the assured's attempted take-off was a hazardous undertaking in view of the weather and the ice on the plane. He testified (R. 360) that, in his opinion, the crash was caused by the failure of the pilot to have proper air speed to fly the airplane under the existing conditions of ice on the plane, the weather and the load on the plane, and that in formulating that opinion (R. 367) he considered the possibility of many specific mechanical failures or pilot errors which could be present and have caused such a crash.

Theoretically possible causes of the accident, other than attempting to take off in an overloaded condition with ice on the wings and with poor visibility, were completely dispelled by the evidence presented.

The evidence shows that on December 22, 1948, the assured's airplane was put through what is called a 400-hour inspection, which is the most complete inspection given an airplane under Civil Aeronautics Authority maintenance regulations, and that the airplane and all its instruments were then in *very good* mechanical condition (R. 272 to 274-381). The evidence shows that the plane was flown 22 hours, 40 minutes between then and January 2, 1949 (R. 282) and that on that date, the day of the crash, was given a 25-hour inspection and was then in *very good* mechanical condition (R. 275-282).

After the crash an expert examined the engines and

accessories for the purpose of determining whether there was any evidence of power failure or malfunctioning of the engines and their accessories during the attempted take-off (R. 199) and found no such evidence (R. 199 to 200).

An expert also examined the instruments on the airplane and was not able to find any evidence of failure or malfunctioning of any of the instruments (R. 205).

Many experienced observers heard the attempted take-off and testified that the motors sounded absolutely normal; that the power was applied evenly and that they heard nothing to indicate malfunctioning of the engines (R. 272-166-182 to 183-324 to 325-403).

As heretofore indicated by the findings themselves, the District Court on this evidence (R. 91 to 92) found that the *assured personally* failed to use due diligence and do all things reasonably practicable to avoid loss or damage to the aircraft and that he negligently, carelessly and recklessly caused the attempted take-off under dangerous weather conditions and when the plane had an accumulation of ice, snow and frost on the upper surfaces of its wings and fuselage and had icicles hanging to its under surfaces, which conditions *materially impaired* the lifting qualities of its wings. He found that it was *extremely unsafe* to attempt to fly the plane in view of these conditions and that the damage to the airplane and the revetment hangar on Boeing Field, which the plane struck, was caused by this negligence of the assured and his failure to use due diligence in the operation of his airplane.

We submit, that on this evidence, that no other find-

ings of fact are possible and that if this court were to examine the evidence independently and without giving the trial court's findings the weight required to be given them under Rule 52 (a) of the Rules of Civil Procedure, it would have to find that the assured attempted to take off with wanton and wilful disregard of the law and likely consequences, and that such recklessness caused the crash.

This evidence presents an extreme example of exactly the kind of risk the insurers did not wish to undertake and beyond question establishes that the assured has violated General Condition 3 of his policy, which provides, in part, as follows:

“The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * * *.”

The language of the policy condition is *clear, explicit and unambiguous* and surely cannot be said to *need interpretation*. However, similar policy provisions have been before the courts on many occasions and the law is uniformly settled that the effect of such provisions is to except losses caused by the assured's negligence from the risks covered by the policy.

In 29 Am. Jur. 714, Sec. 942, the rule is stated as follows:

“Recovery on an accident insurance policy is not defeated by the mere fact that negligence of the insured contributed to the injury, unless the policy expressly excepts from the risk accidents due to the negligence of the insured. Where the policy requires the holder to use ‘due care,’ ‘due diligence’ or in express terms voids liability for

injuries to which the negligence has contributed, the stipulation is generally treated as calling for the same measure of caution and care that would be required of a reasonably prudent man in like circumstances, the ordinary negligence of the policy holder barring a recovery under the contract.”

In an annotation in 29 A.L.R. 714, the rule is stated as follows:

“Where the policy requires the holder to use ‘due care,’ ‘due diligence’ or in express terms voids liability for injuries to which his negligence has contributed, the stipulation is generally treated as calling for the same measure of caution and care that would be required of a reasonably prudent man in like circumstances, the ordinary negligence of the policy holder barring a recovery under the contract.”

The law of the State of Washington is, of course, for application in this case. The Supreme Court of the State of Washington in the case of *Isaacson Iron Works v. Ocean Acc. etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026, was called upon to interpret a policy of insurance virtually identical to that in the case at bar. The agreement in that case provided as follows:

“To insure the Assured against loss by reason of liability imposed by law upon the Assured for damages, on account of damage to or destruction of property (including loss of use thereof and damage or destruction by fire), as the result of an accident occurring during the prosecution of such work on the specified premises and in accordance with the provisions of Insuring Agreement 5 of said Policy, except as to any operations or exposures which are shown to be excluded elsewhere in this Endorsement, and subject further to all

exclusions, conditions and limitations hereinafter contained.”

Condition 1(a) of the policy provided:

“The Assured agrees to use due diligence and exercise reasonable care to avoid doing damage to property of others.”

The court held that the effect of this policy was to except losses caused through the negligence of the assured from the coverage of the policy. In the course of the opinion the court said:

“Nowadays many policies are written which by their terms protect the insured against his own negligence. The ordinary automobile indemnity coverage and insurance against fire are of this class. Such policies are not against public policy. Nevertheless, the theory of insurance which protects the insured against damage to a third person resulting from accident occurring in the course of the insured’s operations, but which does not protect the insured against the result of his own negligence, is perfectly reasonable. It is for the insurer to determine what insurance he will write for a certain premium, and for one desiring insurance to determine whether or not any given policy affords him protection which he desires, and for which he is willing to pay the premium demanded. It is a matter of balancing risk against cost of protection. As was noted in the case of *Cosgrove v. National Casualty Co.*, *supra*, the insurer has the right to determine what hazards it will assume for a specified consideration.

“It is not argued that any advantage was taken of respondent; the policy and the endorsement or rider were there for anyone to read. Respondent was purchasing a policy protecting it in many

contingencies, and plain and simple language in the policy must be given effect as against either party to the contract. The policy is limited to protection against damage resulting from an accident. The insurer's liability is thus at the very outset considerably limited. Damage made necessary by the nature of the work or by the manner of doing it are also eliminated.

"There is nothing essentially illogical or even unreasonable in a provision to the effect that the insurer shall not be liable in case the insured be guilty of negligence. That provision of the policy must either be given effect according to its plain language, or by judicial interpretation written out entirely. If, in the case at bar, respondent may recover against appellant, it is difficult to imagine what respondent's agreement to exercise reasonable care and use due diligence means. The words are plain and scarcely *susceptible of construction*. To limit the language by judicial construction, appears unreasonable."

The case of *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500, was a suit on an insurance policy which provided that competent watchmen should be employed and due diligence used to keep a continuous watch both day and night in and around the plant of the plaintiff when it was idle. The plaintiff employed two watchmen who were foremen in a mill which was from 600 to 1,200 feet distant from the plaintiff's mill, who agreed to watch the plaintiff's mill in addition to their regular duties in the other mill. The court held that the plaintiff had failed to comply with the policy and that its failure voided the policy. In the course of the opinion the court said:

“It is apparent that the plaintiff did not comply with the provisions of the policy above quoted. The policy provides that, whenever the plant is idle ‘competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately around said parts of the plant.’ Competent men were no doubt employed, but it was understood between them and the plaintiff that they were not to keep a continuous watch both day and night in and immediately around the plant, but that they were to watch intermittently at a distance from the premises, estimated at from six hundred to twelve hundred feet therefrom. The apparent object of the plaintiff was to evade its duties under the policy by making a show of compliance therewith. The diligence exercised was to evade, and not to comply with, the terms of the policy. We think the evidence shows that the men employed were competent watchmen, and that if they had been employed to keep a ‘continuous watch * * * in and immediately around’ the premises, the property would not have been destroyed. But they were not so employed, and they did not so watch the property. The effect of the testimony of the officers of the plaintiff company was that the men were merely employed to keep an occasional watch from a distance, which they did, and which was the opposite of the duties required by the appellant. This breach of duty avoided the policy. *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, and cases there cited. This was decisive of the case. There was no question of fact for the jury to pass upon, and the court erred in not granting the defendant’s motions.”

In the case of *Richelieu & O. Nav. Co. v. Boston M.*

Ins. Co., 136 U.S. 408, 10 S. Ct. 934, 34 L. ed. 398, the Supreme Court of the United States was called upon to construe the provisions of a policy which were as follows:

“Touching the adventures and perils which the said Insurance Company is content to bear and take upon itself by this policy, they are of the lakes * * * excepting all perils, losses, misfortunes or expenses consequent upon and rising from or caused by the following or other legally excluded cases, viz.: * * * incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading; stowing and securing the cargo of said vessel; * * * .”

The evidence in this case showed that the vessel insured was operating in Canadian waters, had a defective compass and was operating in violation of a Canadian statute requiring it to go at moderate speed in a fog. The vessel ran aground and had no lookout at the time. The court held that the burden was on the plaintiff to show that the damage was covered by the policy, that is, that it occurred without the assured's negligence. In the course of the opinion the court said:

“In *The Pennsylvania*, 86 U.S. 19 Wall. 125 (22:148) it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. And this was but the statement of the settled rule in collision cases. In this case, in view of the seventh section of the Canadian Statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were

excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. If it appeared that the misconduct or unseaworthiness was cause *sine qua non*, it was an excepted peril, and that, as stated by Judge Brown, 'ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track.' We think there was no error in giving the eleventh instruction asked by the defendant, and forming the subject of the eighteenth assignment of error. And this disposes also of the sixteenth and seventeenth errors assigned, as the burden was upon the plaintiff to show that the stranding and its consequent losses, misfortunes and expenses were caused by perils insured against, and as to the perils consequent upon and arising from or caused by the want of ordinary care and skill in navigating the vessel, the plaintiff was its own insurer."

The case of *Chicago S.S. Lines v. U.S. Lloyds*, 12 F.(2d) 733 (cert. denied in 273 U.S. 698, 47 S. Ct. 94, 71 L. ed. 846) was a suit on an insurance policy providing:

"This insurance also especially to cover * * * provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager."

From the facts in the case, it appears that in repairing the ship a doubler plate was put on at the direction

of the manager of the assured in such fashion that water could get into the ship under certain circumstances. Water did get into the ship and it sank. The court held that the loss was not covered by the policy. In the course of the opinion the court said:

“The improper placing of the doubler plate and the failure to calk the same, under the manager’s supervision, permitted the water to enter the boat and soak into the rolls of paper on that side, thereby causing the listing and ultimately the sinking. We find that the sinking resulted from want of due diligence on the part of the manager of the owner of the ship, a loss not covered by the policy.

“The negligence of the manager is not excused by the fact, if it be a fact as urged, that all vessels leak more or less, and that much less water than could have been taken care of by the pumps, had it reached them, got into the hold by reason of the manner in which the plate was attached. This is neither reason nor excuse for the carelessness of the manager, whereby more than the inevitable amount of water did get into the hold in such a manner that it was soaked up by the cargo and never reached the pumps.”

The case of *Leatham Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 F.(2d) 923, involved a policy of insurance which provided coverage for loss occasioned through the negligence of the crew of the vessel, providing such loss did not occur from want of due diligence by the owners of the vessel. From the facts in the case it appears that holes were cut in the hatches without permission of the Federal Marine authorities which violated the rules and regulations of the Board of Supervising Inspectors for the Great Lakes.

These rules and regulations have the force and effect of law. The loss was occasioned through water entering through the holes in the hatches. The court held that there was want of due diligence by the owner and that the loss was not covered by the policy. In the course of the opinion the court said:

“If we are in error in our belief that the contracts never became effective, the evidence does not disclose a loss covered by the policies. They provided that the insurance should cover loss occurring through ‘negligence of the master, mariners, engineer or pilot,’ provided however, that ‘such loss has not resulted from want of due diligence by the owners.’ As we have pointed out, the court was justified in concluding that the cause of the loss was the entry of water through 12 of the holes which could not be closed except by gravity and battened down tarpaulins. This defect, as we have seen, was the result of libelants’ failure to comply with the requirements constituting a condition precedent to the grant of permission to make the holes. The continuation of this failure until the time of the loss was want of due diligence upon the part of the owner. Again, irrespective of the burden of proof, the evidence is undisputed that the owner at no time provided means for securing the covers on 12 of the holes other than the force of gravity and battened down tarpaulins. Under the cited clauses of the policy and the findings of the court, of which we approve, justified by the evidence, the loss occurred under the exception of the clause, namely, lack of due diligence by the owners. Consequently there was no liability.”

In the case of *Western Assur. Co. v. Shaw*, 11 F.

(2d) 495, the policy of insurance sued upon excepted from the risks covered those caused "from the want of ordinary care and skill in loading and stowing the cargo." From the facts in the case it appears that three 60-ton boilers were placed in the middle of the barge insured without chocks or shoring. As a result the barge listed, the boilers rolled to one side and the barge sank. The court held that the loss was clearly within the exception in the policy. In the course of the opinion the court said:

"Whether waves from a passing steamer or something else caused the barge to list, the fact is that she did list. The list would have been harmless, if the boilers had remained stationary for the barge would have immediately straightened up, but when the boilers, weighing 180 tons, rolled to her starboard side, she could not do so. The failure, therefore, to shore or chock the boilers as safe and proper loading requires, set in motion a train of consequences—the opening of seams, consequent leaking, the fastening of wire rope or cables to the boilers and wharf—that caused the sinking and occasioned the loss. It seems to us that there is no escape from the conclusion that there was 'want of ordinary care and skill in loading' and that this resulted in an unseaworthy condition of the barge with respect thereto. *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 24 L. ed. 395; *Hagemeyer Trading Co. v. St. Paul Fire & Marine Ins. Co.* (C.C.A.) 266 Fed. 14; *Cary v. Home Ins. Co.*, 139 N.E. 274, 235 N.Y. 296, 1923 A.M.C. 438.

"The policy excepted from the risks insured against all claims arising 'from the want of ordinary care and skill in loading and stowing the

cargo.' The proofs not only show that the claim does not come within the risks against which the barge was insured, they clearly show that it arises from the want of ordinary care and skill in loading, and comes within the above exception."

The case of *Garcelon v. Comm. Travelers Eastern Acci. Asso.*, 195 Mass. 531, 81 N.E. 201, was a suit brought on an accident policy which contained a stipulation that the insurance company should not be liable "for any injury which the members by the exercise of ordinary care, prudence and foresight might have avoided or prevented or to which the members' own negligence shall have contributed." The court held that when the insured jumped on a moving freight train and was injured, he could not recover under this policy.

The cases of *Morris v. Comm. Travelers Eastern Acci. Asso.*, 98 N.E. 599, and *Nichols v. Comm. Travelers Eastern Acci. Asso.*, 109 N.E. 449, involved an identical policy provision.

The case of *Manter v. Boston Fire Ins. Co.* (N.H.) 35 Atl.(2d) 196, was a suit on a policy which contained a clause that the policy should be voided if the insured should fail to make all reasonable exertions to save and protect the property in case it should be exposed to loss and damage by fire. From the evidence it appeared that the insured made a statement that when the fire came to her attention it was a small soot fire in the chimney and that she could easily have put it out but that she stood by and did nothing. The court held that the policy was voided by the assured's failure to act.

The case of *Standard Life & Acc. Ins. Co. v. Jones*, 10 So. 530, was a suit on a policy which provided:

“It is also an express condition of the policy that the insured shall at all times use due care and diligence for his personal safety and protection.”

The court held that where the insurer plead that the insured failed to use due care by getting off a moving engine with his back towards the direction in which it was going, a replication which did not deny that the assured failed to use due care was insufficient.

Section 3 of the *Harter Act*, 46 U.S.C.A. 192, from which the language of the policy may perhaps have been borrowed, contains language essentially the same as that contained in the insurance policy herein sued upon. This section is, in part, as follows:

“If the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy * * *.”

This section of the act has been before the courts for construction on numerous occasions. The courts have pointed out that diligence and negligence are relative terms and depend on varying circumstances and that due diligence requires such watchful caution and foresight as the circumstances of the particular service demand—that it must be adequate to the occasion. See *Nord-Deutscher Lloyd v. President, etc. of Insurance Co. of N.A.*, 110 Fed. 420, 49 C.C.A. 1, and *Martin v. The Southwark*, 24 S. Ct. 1, 191 U.S. 1, 48 L. ed. 65.

From these many court decisions construing provi-

sions similar to those contained in General Condition 3 of the assured's policy it is apparent that a policy provision requiring an assured to use "due diligence" is the equivalent of a provision requiring him to be free of negligence and that violation of such a condition avoids the policy. Since the assured in the case at bar has been abundantly shown to have violated the law in wilful disregard of the likely consequences in attempting to take off as he did, it follows that he has clearly violated General Condition 3 of his policy and thereby defeated the right to recover for the damage to his airplane.

The evidence heretofore delineated concerning overloading, which is entirely undisputed, and very largely just a matter of mathematical calculation, establishes that the assured has breached General Condition 2 of his policy. General Condition 2 provides:

"The aircraft shall be operated at all times in accordance with the operations as authorized in the operations record of the aircraft."

The only possible question concerning this condition is as to what is meant by the words "the operations record of the aircraft." This is, of course, a matter of the intention of the parties. It seems perfectly obvious that the parties were referring to the "operation record" referred to in Section 43.1010 of the Civil Air Regulations promulgated by the Civil Aeronautics Board, and reading as follows:

"Aircraft Operation Record. An aircraft for which an airworthiness certificate is currently in effect shall not be operated unless there is attached to such airworthiness certificate an appropriate aircraft operation record prescribed and issued by the Administrator, nor shall such aircraft be

operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. Any change made to the aircraft which effects these limitations shall be made under the supervision of an appropriately rated mechanic or other person authorized by the Administrator and such change shall be noted in the Aircraft Operation Record.”

This regulation was in effect for several years in this form and until January 27, 1948, when it was amended (see 13 Fed. Reg. 474) to read as follows:

“(1) *Aircraft operating limitations.* An aircraft for which an airworthiness certificate is currently in effect shall not be operated unless there are available in the aircraft appropriate aircraft operating limitations set forth in a form and manner prescribed by the Administrator, or a current airplane flight manual approved by the Administrator; nor shall such aircraft be operated otherwise than within its prescribed operating limitations.”

From these regulations having the force and effect of law, it appears that prior to January 27, 1948, every airplane for which an airworthiness certificate was issued was required to have attached to the certificate an “aircraft operation record” issued by the Administrator and containing limitations on the operation of the plane and that after January 27, 1948, every such plane was required to carry “aircraft operating limitations” as set forth on a form prescribed by the Administrator and containing similar limitations on the operation of the plane.

Appellants admitted (R. 20 to 21-53) that the “aircraft operation record” containing the operation lim-

itations was Department of Commerce, Civil Aeronautics Authority, Form ACA 309 and was replaced by the "operation limitations" Form ACA 309a containing the same limitations.

While the assured's policy was issued a few months after the regulation changed the wording from "operation record" to "operating limitations" and had not been amended to reflect the change, we do not believe there is any possible doubt that the assured knew when reading General Condition 2 that he was supposed to operate the plane in accordance with the limitations prescribed by the Civil Aeronautics Authority when they granted him an airworthiness certificate which the law, as well as the policy, required him to do.

The assured's breach of this condition of his policy defeats the right to recover on both the first and second claims in the amended complaint (R. 25 *et seq.*).

The evidence of overloading also establishes a breach of General Condition 1 in the policy. This provision is in part as follows:

"At the commencement of each flight the Aircraft shall have a valid and current Airworthiness Certificate issued by the Civil Aeronautics Authority." (Italics ours)

The appellants admitted, pursuant to appellees' request (R. 20-53) that the assured's airplane was licensed under Department of Commerce, Civil Aeronautics Authority Certificate of Airworthiness (Form ACA 1362) which provides:

"This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the

applicable aircraft operations limitations and maintained in accordance with the Civil Air Regulations.”

As heretofore pointed out, the assured attempted to take off with at least *2,130 pounds*, or approximately *28 per cent* more load than he was permitted to carry by the operation limitations (R. 21-53) for his airplane. He thus violated 49 U.S.C.A. 560 and invalidated his Certificate of Airworthiness according to its explicit terms at the commencement of this flight and thereby breached General Condition 1 of his policy.

The breach of this condition by the assured also defeats the right to recover on both the first and second claims in the amended complaint (R. 25, *et seq.*).

It is manifest from the foregoing discussion of the evidence that the assured violated three of the general conditions of his policy of insurance in making the attempted take-off as he did. Thus the only problem remaining in testing the accuracy of the District Court's judgment for appellees is as to what effect the breach of such conditions has as a matter of law.

A Breach of a Condition Material to the Risk Voids a Policy of Insurance.

Appellants make no contention whatsoever in their brief concerning this phase of the case, apparently because the law of the State of Washington is thoroughly settled in accordance with the law generally, that where a condition in an insurance policy is material to the risk and a breach thereof exists at the time of the loss the insurer is relieved of liability on the policy.

Shoshone Concentrating Co. v. Hamberg-Bremen Fire Ins. Co., 64 Wash. 638, 117 Pac. 500;

Smith Lumber Co. v. Netherlands F. & L. Ins. Co., 135 Wash. 547, 238 Pac. 565;

Johnson v. Franklin Ins. Co., 90 Wash. 631, 156 Pac. 567;

Henslin v. H. S. Fire Ins. Co., 152 Wash. 637, 278 Pac. 702;

Ferguson v. Lumbermen's Ins. Co., 45 Wash. 209, 88 Pac. 128;

Clark v. Western Ins. Co., 168 Wash. 366, 12 P.(2d) 408;

Canton Ins. Off. v. Independent Trans. Co. (C.C.A. 9) 217 Fed. 213;

Georgian, etc. v. Glenn Falls Ins. Co., 21 Wn. (2d) 470, 151 P.(2d) 598;

Johnson v. Inland Empire, etc. Ins. Co., 155 Wash. 6, 283 Pac. 177;

Brehm Lbr. Co. v. Svea Ins. Co., 36 Wash. 520, 79 Pac. 34;

Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society (C.C.A. 9) 146 Fed. 695;

Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 462, 14 Sup. Ct. 379, 38 L. ed. 231;

Richardson v. Superior Fire Ins. Co., 192 Wash. 553, 74 P.(2d) 192;

Delaware Ins. Co. of Philadelphia v. Greer,
120 Fed. 916, 57 C.C.A. 188, 61 L.R.A.
137;

Menger v. Inland Empire Ins. Co., 118 Wash.
514, 203 Pac. 934;

McKernan v. North River Ins. Co., 206 Fed.
(Wash.) 984;

*Neil Bros. Grain Co. v. Hartford Fire Ins.
Co.* (C.C.A. 9) 1 F.(2d) 904.

It is not possible to intelligently argue, and we do not believe appellants can argue that General Condition 1 requiring the assured to have a valid airworthiness certificate at the commencement of each flight, General Condition 2 requiring him to operate his plane in accordance with the limitations placed on it for reasons of safety by the Civil Aeronautics Authority, and General Condition 3 requiring him to use due diligence and do all things reasonably practicable to avoid loss of or damage to the insured property, do not materially affect the risk which the insurer was called upon to carry. Obviously, each was designed to absolve the insurers in just such a case as the case at bar where the assured flouted the law and threw all precaution to the winds.

Since, under the evidence, a breach of each of these conditions is shown to have existed at the time of the loss, it is apparent under the foregoing authorities that the District Court properly awarded judgment to appellees. The assured's wanton and wilful violations of the law in attempting to take off with an excessive load and insufficient visibility and reckless disregard of

the danger presented by the ice and snow on his plane which breached General Conditions 1, 2 and 3 of his policy defeats the first claim of appellants relating to the airplane itself and the breach of General Conditions 1 and 2 defeats appellants' second claim relating to the damage done to the hangar of King County.

ARGUMENT IN ANSWER TO APPELLANTS

We wish to invite the court's attention to the fact that appellants in putting their brief together have chosen the method of brief writing usually followed by a writer when the law and the facts in the case are against him. In their zeal in presenting their case, they have seized upon, and usually quoted out of context, every single portion of the record in any way favorable to them. They have then enlarged upon this work by assertion and argument not borne out by the record. Because of their method, we do not believe the appellants' brief accurately reflects the true facts in the record and we caution the court to look to the record for the true facts in the case.

Answer to Appellants' Contention That the Certificate Should Be So Construed as to Permit Their Recovery.

Summary

The language of the certificate is plain, clear, explicit and unambiguous. It obviously prevents recovery for damage to the assured's airplane caused by his own negligence. It needs no construction and the court may not enlarge the coverage paid for by re-writing the contract the parties entered into.

From pages 10 to 28 of their brief appellants make the contention that the certificate of insurance in suit protects the insured even though he is guilty of negligence and argue that General Condition 3 does nothing more than prescribe certain duties for the assured in event of damage.

This argument ignores the clear, plain and explicit language of the Condition which provides:

"The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured, and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Insured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories."

This condition quite obviously defines a two-fold duty for the assured, *one*, his duty prior to the time the airplane sustains damage and *two*, his duty in the event the aircraft has sustained damage. The provision, which is a single sentence, divides itself naturally and inevitably into two parts, each of which provides for an entirely different factual situation. The first

clause imposes a duty of general application upon the assured at all times by the language "*The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured.*" The second imposes a specific and additional duty "*In the event of the Aircraft sustaining damage*" when it says: "*and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories.*"

Any other or different interpretation renders the verb "avoid" in the first clause language "** * * avoid * * * any loss of or damage to the property hereby insured*" meaningless. Loss or damage is *avoided* before and not after the event. Nor does the use of the verb "diminish" detract, as suggested by appellants, from this interpretation for this defines the duty of the assured when an accident appears inevitable or likely. The assured is required to do all things "*reasonably practicable*" to minimize the damage when an expected accident occurs, *i.e.*, he shall, *if possible*, bring the aircraft down in an open field rather than in an inhabited area, secure cargo, break out fire-fighting and other safety equipment, jettison inflammable cargo if over water, make ready escape doors and hatches and do other things of a similar nature which would be expected to *diminish* the damage caused from the accident which is about to happen.

The dual character of the condition becomes even more apparent when the second clause is considered.

The entire clause begins with and is limited by the words "*in the event of the Aircraft sustaining damage*" which is not contained in the first clause. Only then and in such event is it said that the assured or his agent "*shall forthwith take such steps*" as are required "*to ensure the safety of the damaged aircraft.*" The whole clause is directed at the assured's duty to take positive steps after the insured plane has become a damaged aircraft.

It seems perfectly obvious and crystal clear that the whole object of the first clause of this "*due diligence requirement*" is to impose upon the assured the affirmative duty to take all reasonable and practicable steps to avoid loss of or damage to the insured airplane and to protect the insurer from such wilful negligence and flagrant disregard of duty as was exhibited by the assured in this case.

As said by the Supreme Court of the State of Washington in the case of *Isaacson Iron Works v. Ocean Acc. etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026, in interpreting an almost identical policy:

"The words are plain and *scarcely susceptible of construction*. To limit the language by judicial construction, appears unreasonable."

As said by the court in *Delaware Ins. Co. of Philadelphia v. Greer*, 120 Fed. 916, 57 C.C.A. 188, 61 L.R.A. 137 and quoted by this court with approval in *Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society*, 146 Fed. 695:

"The obvious meaning of their plain terms is not to be discarded for some curious hidden sense which nothing but the exigency of a hard case and

the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and popular sense."

We wish to call the court's attention to the fact that appellants in making their argument have cited no case whatsoever construing similar language to that contained in the certificate of insurance in the case at bar.

As pointed out in our argument in support of the judgment, the cases uniformly hold that the effect of such a provision as that contained in the certificate here is to exclude risks caused by the assured's negligence from the coverage of the policy.

We believe the foregoing completely answers appellants' argument. The language of the general condition is clear, plain and unambiguous and *needs no construction*. The court must take it as it finds it. We will proceed, however, to consider appellants' argument more particularly.

Appellants assert that the District Court interpreted the certificate, and particularly General Condition 3, so as to exclude coverage for any loss or damage caused by the negligence of the assured, that an interpretation excluding coverage for negligence would defeat the primary purpose of the certificate and would nullify the third party liability coverage provided by section 2 of the certificate.

From the proceedings in the court below and the record we do not know fully how the District Court

interpreted General Condition 3. We do know that appellees did not contend in the District Court that a breach of General Condition 3 would avoid the liability coverage provided by section 2 of the certificate and with which appellants' second claim in the amended complaint is concerned. Such a contention could not reasonably be made in the face of the plain language of the Condition which says:

"The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured."

It is clear from the record that the District Court felt that the assured violated this condition and that this violation defeated the appellants' right to recover for the loss of the airplane which was the property insured and with which appellants' first claim in their amended complaint is concerned. It is also clear that the District Court granted judgment for appellees on appellants' second claim which involved the third party liability coverage. He *could properly*, and must have done so because of the assured's violation of General Conditions 1 and 2 which, as pointed out in our argument in support of the judgment, he is shown by uncontradicted evidence to have violated.

It is true that the District Court, though expressly stating that he was not of the opinion that the plane was not overloaded, made no findings of fact concerning the airplane's taking off with a load in excess of that permitted by law (R. 118). However, such findings were proposed and not made by the District Court after appellants objected to his making such findings

(R. 115 to 119). The findings of fact which the District Court did make, of course amply support the judgment for appellees on appellants' first claim for damage to the airplane.

If the District Court erred in failing to make such findings in support of his judgment for appellees on appellants' second claim, it was because appellants *invited him to so err* and appellants may not complain of or take advantage of the error, if any, in this court.

Smails v. O'Malley, 127 F.(2d) 410;

Missouri K. & T. Ry Co. v. Elliott, 103 Fed. 96 (affirmed 22 S. Ct. 937, 184 U.S. 695, 46 L. ed. 763);

National Loan & Investment Co. v. Rockland Co., 94 Fed. 335;

Haley v. Kilpatrick, 104 Fed. 647;

Platt v. United States, 163 F.(2d) 165;

John B. Stetson Co. v. Stephen L. Stetson Co., Ltd., 133 F.(2d) 129.

Even if appellants were permitted to urge that the District Court erred in failing to make such findings in support of his judgment for appellees on the second claim, it would not follow that this court would have to remand the case for such findings.

As said by the court in the case of *Reinstine v. Rosenfield*, 111 F.(2d) 892:

"From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

Also, as pointed out in our argument in support of the judgment, the evidence concerning overloading was entirely uncontradicted. It is almost entirely found in the admissions made by appellants pursuant to request made by appellees and in the depositions which were read in the District Court. As said by the court in the case of *McComb v. Utica Knitting Co.*, 164 F.(2d) 670:

“As that evidence is entirely documentary, no issue of witness’ credibility arises; therefore, we can pass on the facts as well as the trial judge and need not remand for findings by him.”

See also:

Burman v. Lenkin Const. Co., 149 F.(2d) 827;

Hazeltine Research v. General Motors Corp., 170 F.(2d) 6;

Sbicca-Del Mac v. Milius Shoe Co., 145 F.(2d) 389;

Moore on Federal Procedure, Sec. 52.06(2);

Cleveland Clinic Foundation v. Humphries, 97 F.(2d) 849.

Appellants next discuss (Brief 14 to 20) general principles governing construction of *ambiguous* policies of insurance and cite authorities that the negligence of the assured does not defeat recovery on a policy *unless* the policy so provides. These authorities obviously have no application to the case at bar since the policy is clear, plain and unambiguous and clearly provides that the assured cannot recover for any damage to his airplane caused through his own negligence.

Appellants argue that an insurance policy should

not be given a construction that will end in an unreasonable or absurd result or that defeats the manifest intention of the parties and the very object and purpose they had in mind in entering into the contract. It would certainly not be absurd or illogical or unreasonable or hard on an insured who was acting as a common carrier and dealing with human cargo to require him to use due diligence to protect the lives of his passengers. Most certainly there is nothing absurd or illogical or unreasonable in a policy which provides insurance against the claims of third parties when the assured operates his airplane within the limitations prescribed for it for reasons of safety by the Civil Aeronautics Authority *irrespective of his negligence* and provides him with insurance for the accidental loss of or damage to his airplane which is not caused by *his own* negligence. That is exactly the insurance afforded by the clear and plain meaning of the certificate in the case at bar.

A policy, of course, could have been written insuring against loss of or damage to the airplane caused by the assured's negligence and insuring him even though he flew the plane in violation of the limitations placed upon it for reasons of safety by the Civil Aeronautics Authority. Whether the insurer would have been willing to write such insurance and whether the insured would have been willing to pay the greatly increased premium such insurance would demand is unknown. The fact is that no such policy was issued and the parties must have intended to make the contract which they did make and which is perfectly reasonable and sensible in every particular.

The assured made similar arguments concerning the general principles governing the construction of an insurance policy to the Supreme Court of Washington in the recent case of *Hamilton Trucking Service, Inc. v. Automobile Insurance Co.*, 139 Wash. Dec. 636, 237 P. (2d) 781. In disposing of the assured's arguments the court said:

"The respondent, in support of the judgment, cites and relies upon cases from seven states in all of which the courts have decided that, in similarly worded policies, the risk coverage included both collision of the vehicle of conveyance and also collision of the load with another object. We shall not make an analysis of such cases as they follow substantially the same pattern. Among such cases are *Gould Morriss Electric Co. v. Atlantic Fire Insurance Co.*, 229 N.C. 518, 50 S.E. (2d) 295, and *C. & J. Commercial Driveway v. Fidelity & Guaranty Fire Corp.*, 258 Mich. 624, 242 N.W. 789. The courts did not use precisely the same reasoning in arriving at their respective conclusions. In general, they took the position that, even though the language used in the policy then under consideration was not ambiguous, nevertheless the use of certain well-established rules of interpretation and construction of insurance contracts was warranted, and that the intent of the parties to the insurance contract should be ascertained. The thought was expressed that manifestly the purpose of the insurer was to protect the insured against loss or damage to his property while being transported, and with such thought as a foundation the theories advanced were that the risk of coverage provision was capable of two interpretations and the one most favorable to the insured should be adopted; that inasmuch as the policy

was prepared by the insurer it should be construed against it; that to confine the risk coverage to collision of the vehicle with some object would reach an absurd result and one not contemplated by the parties; that the word 'collision' was intended as descriptive of the way and means of sustaining loss rather than a limitation of liability.

"We have not adopted the lines of reasoning found in the cases cited by respondents in order to determine the intent of the parties, or what they may or must have contemplated when making an insurance contract with reference to the extent of the risk coverage when it was clear that the words were used in their ordinary sense or meaning, nor when the language used was plain and unambiguous. We have resorted to familiar rules of interpretation of words and construction of language used in such contracts in order to ascertain the intent of the parties, or what they contemplated, when it appeared that certain words were used in a special or restricted sense, were susceptible of different meanings according to the way in which they were used, or when the language used was of doubtful import or ambiguous.

"We have taken the position in such matters that a rule of construction should not be permitted to have the effect to make a plain agreement ambiguous and then construe it in favor of the insured. Our many cases on the subject of interpretation and construction of insurance contracts may be found in volume 7 of the Washington Digest and Cumulative Annual, Insurance, Key No. 146. We see no occasion to engage in a review of, or to quote from them. The words of the part of the policy under consideration must be accorded their ordinary meaning. The language used is

plain and unambiguous. There is nothing to interpret or construe. We cannot avoid feeling as we read the cases cited by respondent that those courts have created ambiguities where none existed and have then used rules of construction to determine the intent of the parties and what they must have contemplated, thus enlarging the risk coverage of the insurance policies under consideration."

Appellants next argue (Brief 21 to 29) that the purpose of General Condition 3 is limited to requiring the assured to mitigate damages in the event the aircraft is damaged. They recognize that it is not so limited unless the plain and unequivocal language of the condition is rewritten, which they proceed to do, from pages 25 to 29 of their brief. To shift the "and" separating the two clauses in this condition as suggested by appellants would make the condition awkward, unnatural, and in effect say the same thing twice. The court may not rewrite the contract of the parties but must take it as it finds it.

The appellants assert that the condition so limited would serve a useful purpose since it is common knowledge that aircraft often sustain damage which grounds them in places where they would be subject to further damage. It is also common knowledge that non-scheduled air carriers are notoriously reckless and careless and the condition *as written* serves not only the useful purpose mentioned by appellants but the further useful purpose of protecting the insurer against claims for accidental damage to the airplane caused by the negligence of a careless and reckless operator.

Appellants comment upon the fact that the word "negligence" is not used in the condition. As will be seen from the argument in support of the judgment, the courts universally regard a provision requiring that "the assured shall use due diligence" as nothing more than a positive way of saying that he should not be guilty of negligence. This is the natural way to state it in advance as in a policy of insurance. We also note that appellants in rewriting the policy (Brief 28 to 29) were not able to make it meaningful without also stating the duty to use due care positively before repeating it negatively.

Answer to Appellants' Contention That Appellees Are Liable Even Though Policy Excepts Losses Caused by the Assured's Negligence from the Coverage.

Summary

The evidence overwhelmingly establishes that the assured, though several times forewarned of the probable consequences, recklessly attempted to take off with a dangerous accumulation of ice, snow and frost upon his airplane. The wholly uncontroverted evidence establishes that the assured flouted and violated the law in attempting to take off with a large overload and grossly inadequate visibility.

From pages 28 to 56 of their brief appellants advance the contention that appellees are liable in this case even if the policy excepts losses caused by the assured's negligence from the coverage.

Appellants assert (p. 29) that an insurance company which seeks to avoid a policy of insurance for breach of condition has the burden of establishing such

breach by *clear and convincing* evidence. This is but one of the many examples of exaggerated inflammatory argument in appellants' brief which could be pointed out. The text which they quote on page 30 in support of their argument doesn't refer to who has the burden of proof and uses the term "preponderance" rather than "clear and convincing."

We do not believe that the question of whether the insurer has the burden of showing a breach of condition or the assured has the burden of showing that a loss has occurred which is within the terms and conditions of his policy is of any significance in this case in view of the undisputed evidence in the record. However, we do wish to point out that many courts, including the Supreme Court of Washington, and the Supreme Court of the United States, take the view that the assured has the burden of proving that he has sustained a loss within the terms and conditions of his policy.

Isaacson Iron Works v. Ocean Acc. etc. Corp.,
181 Wash. 221, 70 P.(2d) 1026;

Richelieu & O. Nav. Co. v. Boston M. Ins. Co.,
136 U.S. 408, 10 S. Ct. 934, 34 L. ed. 398.

Appellants assert (p. 30) that the portion of Finding IX of the District Court, which they quote, was the only thing found by the District Court as to the cause of the crash. We refer the court to pages 3 and 4 of this brief for the *complete* text of Findings IX and X on this subject.

Appellants then refer (p. 31) to the uncontradicted evidence concerning the weather conditions and visi-

bility at the airport as reported by the Weather Bureau. We fail to see how appellants can take comfort from this evidence. As pointed out in our argument in support of the judgment, this evidence establishes conclusively that the assured had visibility of only one-eighth the distance required by law for a contact take-off, and one-fourth the distance required by law for an instrument take-off, and his violation of the law by attempting to take off under such circumstances constitutes *negligence per se*.

Sec. 60.79, Title 14, 1949 Ed. C.F.R.;

49 U.S.C.A. 560;

McCoy v. Courtney, 25 Wn.(2d) 956, 172 P.(2d) 596.

Appellants then refer to the fact (p. 31 to 32) that the court excluded evidence of other take-offs. This ruling was, of course, proper as we shall see more fully later herein. Weather conditions were shown to be very variable (R. 143-144-145, 154-383-388-392-399-400) on the evening in question. Had such evidence been admitted it would have been of no value without going into all the collateral circumstances and conditions surrounding the flights and the fact that the last pilot to take off was fined \$300.00 (R. 515) for taking off under weather conditions where take-off was not permitted.

Appellants next object (p. 32) to the general language of the District Court's finding that the assured "negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions" and that

such negligence was the proximate cause of the crash and the damage. The court could, perhaps, have been more explicit but the evidence concerning the temperature, visibility, ice crystals floating in the air and ice on the runway was not in dispute and thus the court could conveniently conclude that the combined conditions were "dangerous." Appellants assert that it is common knowledge that planes often fly in bad weather and have equipment to meet such conditions. The record doesn't establish the conditions under which airplanes generally try to fly or take off or how they are equipped, or that they endeavor to take off in violation of law. It does establish, however, beyond a peradventure of a doubt, as the finding by the District Court above quoted indicates, that the assured in this case with reckless disregard for human life, attempted to take off when the visibility was not such as was required by law for him to attempt to take off and when other weather conditions were unfavorable to take-off.

Appellants next assert that the "*veering* to the left edge of the runway" is a unique feature of the crash since it is common knowledge that the pilot of any plane attempts to proceed in a straight line down a runway.

The only testimony concerning the tracks left by the airplane given by any one in the case was given by appellant's witness Mugge (R. 520 to 523). His recollection was not very good and his testimony was even more equivocal than that of several witnesses whose testimony has been criticized by appellants. However, we believe, as we do of the others' testimony, that his best recollection of the facts was given and a portion

of his testimony (there was no testimony in the case as to the width of the runway) was as follows (R. 520-521):

“Q. (By Mr. Cluck): Will you briefly describe the tracks as you observed them on the runway?

A. Yes. As I recall, the tracks were picked up from the end of the runway to a point about one thousand feet down the runway in a comparatively straight line. From that point they assumed a *gentle curve* towards the east side of the runway, or the left hand side, leaving the runway at a point, if I remember right, about 1800 feet from the end of the runway.

Q. Without reference to detail, Mr. Mugge, the tracks *described a gentle curve*, did they, to the left of the runway, is that correct?

A. Will you say that again?

Q. I say without going into a lot of detail, did they describe a curve to the left prior to the leaving of the runway?

A. That is right.

* * * * *

A. I don't recall that the track actually went to the edge of the runway. My memory isn't that good, but it seems to me there was a one wheel track. Whether it was intermittent or solid, I don't quite recall at this time.”

We do not see how appellants can stretch this testimony into “*veering*” but when the action of the plane as described by the witness is coupled with the undisputed testimony concerning visibility, we submit that one must *inevitably conclude*, as the District Court apparently did, that the pilot *couldn't see where he was going* and gently but surely curved his plane in

a direction heading off the runway into the path of structures when he had over a mile of clear runway ahead had he just been able to see it.

Appellants spend the next six pages of their brief (pp. 33 to 39) distorting the testimony of John O. Vineyard, Jr., one of the principal eye witnesses, and a wholly disinterested one, to the events leading up to the crash and the crash itself. We think it will take a complete reading of his testimony which is found in the record at pages 314 to 341 and 528 to 533, to clear up the distortion and we invite the court to do so. Some of the distortions follow. At page 34 appellants quote Mr. Vineyard's testimony as follows:

“Q. What do you consider caused the crash?

A. Well, from all the evidence and what I examined myself, I say between pilot proficiency and the icing conditions and possibly the overloading of the airplane that caused the crash.”

They then assert “The two matters other than icing, referred to in the first of his statements, above, must be disregarded. Testimony to the effect that a cause was ‘possibly’ overloading merits no weight as proof of the actual cause of the accident.” Appellants neglected to quote the testimony which immediately followed the question and answer set forth above. This was (R. 328):

“MR. CLUCK: What was the first one you mentioned?

THE WITNESS: Pilot proficiency.

THE COURT: What of those things did cause the crash, in your opinion, if you have an opinion?

THE WITNESS: Well, sir, the combination of all, I think, are equally to blame for it. That is my opinion."

At page 35 appellants assert that Vineyard was conscious of the necessity of explaining why the airplane "*veered*" to the left and advanced the theory that the left wing stalled because of a larger amount of ice upon it than upon the right wing. Vineyard did not at any time advance this or any other *theories*. He stated right from the start that he did not examine the upper surface of the right wing and did not know how much ice was upon it. He did testify as an expert (R. 320) that if an airplane took off with more ice on one wing than the other that the one that had more ice on it would stall sooner than the other.

Appellants assert at page 36, and again at page 38, that Vineyard testified it would take "ice in appreciable quantities" and "sizeable quantities of *rough* ice" to cause a wing to stall whereas his testimony referred to was (R. 319):

"Q. Will you explain briefly what it is that makes an airplane fly and the importance of a smooth surface on the wing of an airplane in connection with its lifting qualities?

A. The wing of an airplane is an air foil, so designed to cause lift as it is pulled through the air, and the skin on the wing of the airplane is made as smooth as possible to cause a smooth flow of air over the wing, and much obstruction on the skin will cause a burbling effect of the air passing over the air foil to where it will disturb and make the wing less efficient than it would if it had a smooth surface to flow over, and cause it

to be less efficient to have lift to make the airplane fly.”

At page 39 appellants quote a portion of Mr. Vineyard's testimony as follows:

“Q. How many spots would you say there were on the top of the left wing in the places you have indicated?

A. Probably four or five.

Q. What percentage of the surface of the left wing would you say was covered, to the best of your judgment, with the spots of rough ice and frost?

“A. That is very hard to put it in percentage, because I didn't make that close an inspection of how much ice covered the wing. From standing on the ground and feeling as far as I could, and from the lights of the car shining up on the wing, I could just see the tops of rough places that I observed. I did not examine the wing on top like I did on the bottom.”

They neglected to quote what followed immediately (R. 318).

“Q. Was Mr. Leland there at the airport that night?

A. Yes, he was there at the airplane and he was standing near when we were examining the wings.

Q. In your opinion, Mr. Vineyard, was this airplane in a safe condition to take off at the time you examined it?

A. I can answer that by saying that I would not have tried to fly it off under its present condition, icing condition.

Q. What is your opinion as to whether or not it was safe for some one else to fly it off?

A. No, sir, I did not think it was safe to be taken out."

They also neglected quoting his testimony as follows (R. 328):

"Q. In your opinion, was there enough ice on the left wing to materially affect the lifting qualities of the wing?

A. Yes, sir."

At page 37, appellants, in discussing the examination of the airplane made by Vineyard, state that he "went over to the airplane in the dark, where it was parked at the end of the runway prior to take-off." The record shows (R. 315) that the plane "was on the west side of the field, sitting on a large cement apron in front of Mr. Doug Miner's maintenance place" when he examined it. He was not without light as intimated by appellants but had his car placed in such position that the lights were directed upon the left wing (R. 336-318). Appellants imply by an alleged direct quotation, which is not such a quotation, that Vineyard went over only about twenty inches near the wing tip of the under surfaces of the wings, whereas (R. 316-317-335) he examined all the under surfaces *except* the twenty inches near the wing tips.

At page 41 appellants assert that Vineyard and Flood were the only witnesses to testify concerning the ice on the airplane and at page 42 that only Vineyard testified concerning it. As pointed out in the argument in support of the judgment, several other witnesses testified concerning the ice.

Again at pages 41 and 42 appellants dispose of the expert testimony of Emmett Flood by an out-of-context quotation. We invite the court to read his entire testimony (R. 184 to 197).

At page 42 appellants question the qualifications of Professor Ganzer by asserting that he had made no experiments with the DC-3 type of aircraft involved in this case. The record (R. 355) upon which this assertion is based is as follows:

“Q. Did you make any experiments with DC-3 type aircraft?

A. We have made experiments with DC-3 type wings, the air foil section itself, but not with DC-3 type airplanes, that I have been personally acquainted with, at any rate, but with the type, their wing section, yes.

Q. But you made no experiment with the aircraft itself?

A. Not with the aircraft.”

At page 43 appellants assert that Professor Ganzer testified that icicles on the under surface of the wings “would not be very serious.” The record (R. 351-352) upon which this assertion is based is as follows:

“A. Well, in my opinion, with regard to the icicles, first I would say that such a condition would not be very serious as far as the *lift* of the wing is concerned, on the under surface of the wing, that is. The icicles on the under surface of the wing would increase the *drag* of the airplane, would require more power to be used to get up to a certain speed to take off, and also more power to fly, but *probably* would not have a very serious effect on the lift.”

This is one “probably” that appellants didn’t point out.

At page 44 appellants assert that Mr. Merrill’s connection with the accident “was confined to sitting in court and reviewing testimony during the course of one afternoon” whereas he testified (R. 361):

“I have read about it and also talked to some of the people involved the next morning.”

Appellants also use the out-of-context quotation method on Mr. Merrill (pp. 44 to 45). It is clear from his testimony as a whole (R. 357 to 367) that he believed that the crash was caused by the ice on the airplane, the weather conditions and the overloading. He, as an engineer, of course, recognized the obvious fact in his testimony that the pilot “did not have a proper air speed to fly the airplane under the existing conditions,” that you could fly a house through the air if you got it up to the proper air speed.

From the testimony of Vineyard, Flood, Ganzer and Merrill, all experts in the field, it is crystal clear that ice and frost on the wings of an airplane will radically change the lift and drag characteristics of the wings and thus critically impair the ability of a plane to get off the ground and fly.

At page 48 appellants assert that “data as to weight of the baggage was not available” and intimate that the only testimony concerning the weight of the baggage was given by students who had seen but not lifted it. The fact is that the two passengers *who loaded the baggage* testified as to its weight (R. 397-386).

From pages 49 to 52 appellants argue that there

was no evidence that fog caused the accident. They assert at p. 49 that not a single witness "testified that in his opinion fog was the cause of the crash," after just four pages previously having quoted Mr. Merrill's opinion that the weather conditions were one of the causes of the crash. It would, of course, not have been necessary for appellants to have offered opinion evidence as to this phase of the case since any layman could draw a proper conclusion from the physical facts in evidence which showed the plane curved gently towards the left in a direction heading off the runway after the first thousand feet of its take-off run and during the next 800 feet thereof, with over a mile of clear runway ahead, and the undisputed evidence concerning the visibility at the time of the take-off.

As appellants state, the visibility as reported by the Weather Bureau at the time of the take-off was one-quarter mile. One of the passengers in the airplane (R. 392) testified that the visibility at the time and place of the attempted take-off from the north end of the runway was not too good. At the time of the attempted take-off Miner and Vineyard (R. 322) were within 200 feet of the airplane at the north end of the runway to the west, and were unable to see the airplane itself because of the fog, according to Vineyard. Neither were they able to see the runway lights at that distance of 200 feet.

Appellants state that it is the visibility to the pilot at the place from where he was ready to take off that would be important in determining whether restricted visibility had anything to do with the crash. They then imply that Mr. Miner testified concerning the

pilot's visibility from the point of the attempted take-off by quoting his testimony concerning what the visibility was twenty minutes before the attempted take-off from the point where the passengers were loaded. This was before the airplane ever taxied out to the end of the runway.

Appellants did not ask the assured's employee Miner concerning visibility from the end of the runway where the plane actually attempted to take off but were content to rest upon Mr. Vineyard's testimony. Vineyard and Miner were sitting beside each other in Vineyard's automobile. Their failure to question Miner must have been because his testimony would have accorded with Vineyard's.

The testimony which appellants quoted, coming from Mr. Miner, was to the effect that from the cockpit of the airplane you could see over the top of the fog and see lights around and over the city. If this testimony had related to the time of take-off, it would then be up to appellants to explain their theory a little more fully as to just how it is a pilot is better able to keep a plane on a runway when he can see over the top of fog which is lying between his position in the cockpit and the runway than he can when the fog reaches up over the cockpit.

The undisputed testimony is that the visibility, as reported by the Weather Bureau, was one-quarter mile which means that for the purpose of determining whether the assured *was permitted by law to take off* that he was not so permitted. The undisputed testimony is that at the actual point of the attempted take-off one could not see the airplane or the runway lights

two hundred feet away and appellants had a witness to dispute this testimony had they chosen to do so, or if he would have given any different testimony. The undisputed testimony shows that the assured gently ran his airplane in a direction leading off the runway to the left into the path of structures when he had over a mile of clear runway ahead. We submit that the most logical and in fact, *inevitable*, explanation of this action is that he *could not see whether he was on the runway*.

The appellants argue from pages 52 to 54 that the evidence supported alternate possible causes of the crash but fail to point out any evidence whatsoever in support of this contention. They content themselves with criticizing the form of hypothetical questions asked by appellees of expert witnesses. We submit that the record shows that these questions were based entirely and completely upon competent evidence in the case and religiously followed that evidence. As we have pointed out in our argument in support of the judgment, the theoretically possible causes of the accident are shown to have not occurred.

From pages 54 to 56 appellants argue that any finding of negligence must be based upon the doctrine of *res ipsa loquitur* and quote from an opinion of the Superior Court of King County in the case of the County against the assured's estate for damage to the County's revetment hangar. The record, of course, does not show what evidence was before the King County court. It does show that we objected to the admission of this memorandum opinion (R. 112-113). We submit that there was no basis for the admission of this opinion

in evidence and that the court should have excluded it and that this court should not consider it. However, if the court is interested in considering the findings of other tribunals in connection with this accident, we call attention to the fact that we offered in evidence the report of the Civil Aeronautics Board investigation and findings concerning this accident (R. 293 to 308) which shows what facts were before that body. While the District Court did not receive this report in evidence we submit that he erred in rejecting it, in view of the provisions of *49 U.S.C.A. Sec. 425*, and that it may, therefore, be considered by this court.

The Civil Aeronautics Board found, after reviewing the evidence gleaned by its complete investigation (R. 305), that the assured loaded his airplane beyond the maximum permitted take-off weight; that at the time of the take-off ice covered the bottom surfaces of both wings and there were patches of ice and frost on the top surface of the left wing; that at the time of the attempted take-off the official weather at Boeing Field was visibility restricted to one-quarter of a mile; that there was no indication of any mechanical or structural failure in the aircraft or any of its components and that the probable cause (the statute requires the Civil Aeronautics Board to find the probable cause) of the accident was the attempt to take off in an airplane which had formations of ice and frost on the surfaces of its wings. It thus appears that the Civil Aeronautics Board found that the assured was reckless in the same particulars as the District Court did in this case.

We submit that by direct, uncontroverted evidence

the assured is shown to have been negligent and by such evidence his negligence is shown to have been the proximate cause of the damage to the airplane owned by him. However, we wish to invite the attention of the court to the fact that it is well settled law that neither negligence nor proximate cause need be shown by direct evidence. Both negligence and the casual connection may be shown by facts and circumstances which, in the light of ordinary experience reasonably suggest that a person was negligent in the manner charged and that such negligence operated proximately to produce the injury.

Johnson v. Griffiths S.S. Co., 150 F.(2d) 224;

Nelson v. West Coast Dairy Co., 5 Wn.(2d) 284, 105 P.(2d) 76;

Frescoln v. Puget Sound Traction Light & Power Co., 90 Wash. 59, 159 Pac. 395.

Answer to Appellants' Contention That the Court Erred in Excluding Evidence and Rejecting Appellants' Offer of Proof.

The question objected to concerning which the offer of proof was made (R. 482) was first propounded to the witness Wiley on cross-examination during appellees' case in chief (R. 176) and repeated later during appellants' rebuttal (R. 476). The objection at the time the question was first propounded was that the testimony had no probative value due to remoteness in time and tended to raise collateral issues (R. 176-177). This objection was then overruled but later objection by appellees was sustained when the witness was referred to notes in order to be able to answer the ques-

tion which he said was testimony given before the C.A.B. (R. 178). This kind of ruling by the court was adhered to throughout the trial and was *first made by the court at the request of appellants* when appellees called their first witness (R. 150-151). The appellants will not be heard to complain of the court's error, if any, which they invited.

Furthermore, the court undoubtedly ruled correctly (R. 468) when appellants waited until their rebuttal to recall Wiley and again ask the same question, when he said:

"I think permission ought to have been obtained expressly to save this for rebuttal, in view of the fact that it came up in connection with cross-examination of this witness before."

The witness Crooks, on appellants' rebuttal, was also asked this same question (R. 473) and appellees objected on remoteness again and when it appeared that the same question was involved as with the question asked Wiley, the question was reserved until appellants could check the objection made and sustained to Wiley's question when it was first asked, concerning which they had a different recollection than the record showed, by referring to the earlier record.

After the earlier record of Wiley's testimony was reviewed (R. 476-479) the court remarked (R. 480):

"If you had at the next recess, or asked the opportunity between calling of witnesses to examine the notes that the witness referred to at the time at that moment you could have decided whether or not you wished to proceed further to inquire of the witness, and then if that had been done, it might not have involved the defendants in pos-

sibly recalling other witnesses who have since been excused. I am certain of one thing and that is that this subject should not be gone into without the opportunity afforded to the defendants to recall any witness that they previously excused for the purpose of inquiring from him concerning these facts about which you propose to inquire here. If those witnesses are out of reach, it is obviously placing the defendants in an unfair position."

As noted by the court appellants had had ample earlier opportunity to review the notes the witness referred to and see whether they desired to cross-examine further but had not done so.

Because of the court's views, the offer of proof was made (R. 482) and appellees objected thereto (R. 483 to 487) on the ground that it was not proper rebuttal; that the testimony had no probative value because of remoteness; that a portion of the offered testimony was hearsay, and that it was incompetent, irrelevant and immaterial. The court sustained *all of these objections* (R. 487) apparently changing his earlier view as to remoteness. A portion of the offered evidence was without question, hearsay.

The law is well settled that the absence of other accidents at the place of an alleged defect may not be shown for the reason that such evidence is not only held to raise collateral issues but to have no reasonable tendency to prove that the place traversed was free from danger.

Anderson v. Taft, 20 R.I. 362, 39 Atl. 191;

Fox Tucson Theatres v. Lindsey, 46 Ariz. 388, 56 P.(2d) 1843;

Thompson v. B. F. Goodrich Co., 48 Cal. App.(2d) 723, 120 P.(2d) 693;;

City of Oakland v. Pacific Gas & Elec. Co., 47 Cal. App.(2d) 144, 118 P.(2d) 330;

Lucia v. Meeck, 68 Vt. 175, 34 Atl. 695;

Barlow v. Salt Lake & U.R. Co., 57 Utah, 312, 194 Pac. 665;

Marvin v. City of New Bedford, 158 Mass. 464, 33 N.E. 605;

Mobile and O.R. Co. v. Vallowe, 214 Ill. 124, 73 N.E. 416.

This rule is especially applicable to the facts of this case where the weather conditions were very variable and the assured has been proved to be guilty of negligence in attempting to take off with such an accumulation of ice, snow and frost on the airplane as to make it extremely unsafe to attempt to fly it, in attempting to take off when visibility was such that he was not permitted by law to attempt to take off and in attempting to take off with a load at least 28 per cent in excess of that he was permitted by law to carry and where none of these acts of negligence were committed by the two other planes according to the offer of proof. In fact, we do not know from the offer of proof what kind of planes the other planes were or whether they bore any similarity whatsoever to the assured's DC-3.

In view of the foregoing, we submit that the evidence was properly rejected by the court on each of the

grounds urged and sustained by the court. Furthermore, even if it could be said that it should have been admitted, its rejection was most certainly harmless error as defined by *Rule 61 of the Rules of Civil Procedure*.

CONCLUSION

In conclusion we respectfully submit that appellees issued a certificate of insurance which clearly, plainly and unambiguously insured the owner of an airplane while he was operating the plane within the limitations prescribed for it by the Civil Aeronautics Authority against accidental loss or damage to his airplane caused through *no negligence of his own* and also against the claims of third parties irrespective of his negligence. The premium charged the assured was based upon the risks assumed by appellees.

As previously pointed out, the uncontradicted evidence establishes with certainty that the assured in *flagrant disregard of the lives and safety of his passengers* took off with a load at least *28 per cent* in excess of that he was permitted by law to carry without figuring in the weight of the ice and snow on the airplane. This not only violated the law but also violated the limitations prescribed for his airplane by the Civil Aeronautics Authority and was *negligence per se*. The uncontradicted evidence also establishes that the assured's take-off violated the law and was thus *negligence per se* in that visibility was too limited for him to take off lawfully and other weather conditions were unfavorable. The evidence further establishes that the assured attempted to take off with such a quantity

of ice, snow and frost upon his airplane and particularly the wings thereof as to make it extremely unsafe to attempt to fly the airplane.

In view of the assured's flagrant disregard of the law and reckless abandonment of all caution, we submit that the insurers are entitled to have their contract *read as it was written* and have the judgment of this court affirming the District Court's judgment.

Respectfully submitted,

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

United States Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as
Administrator of the Estate of William F. Leland,
Deceased, and C. W. BREAKIRON, Successor Receiver
for Atlantic and Pacific Airlines,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED, ORION IN-
SURANCE COMPANY, LIMITED, THE DRAKE INSURANCE
COMPANY, LIMITED, subscribing underwriting mem-
bers of Lloyd's, London,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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APPELLANTS' REPLY BRIEF

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FEB 15 1952

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No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

CONDITIONS 1 AND 2 ARE NOT APPLICABLE

These two conditions of the policy were not mentioned by the District Judge in his opinion (R. 76-79) or in his findings of fact and conclusions of law (R. 89-93). We did not discuss them in our opening brief because we felt, as the trial judge apparently did, that they are so foreign to the issues as not to require mention.

Appellees refer to General Condition No. 1 which reads:

“(1) At the commencement of each flight the

aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority.”

Appellees do not deny that the aircraft did have such a certificate at the commencement of the flight. What they contend is that overloading the plane “invalidated” the certificate (p. 33). We have submitted reasons why it is error to assume that there was overloading (Br. 46-49). Even if there had been overloading, it would have nothing whatever to do with invalidating the airworthiness certificate. This is issued as to “each newly-manufactured airplane” that meets published requirements as to type and design.

C.F.R. Sec. 4b.12.

No authority is cited to support the view that overloading would invalidate such a certificate. To argue that such a certificate is invalidated by overloading is on a par with arguing that a truck license is invalidated whenever the vehicle bearing it is overloaded.

Appellees also refer to General Condition No. 2, which reads:

“(2) The aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the aircraft.”

It is not quoted correctly in appellees’ brief (p. 30).

Is it not reasonable to expect that an insurer seeking to escape liability on an insurance policy because of a violation of some provision in an “operations record” would produce the “operations record” and point out explicitly what provision thereof is violated? Instead,

appellees refer to a form printed by the C.A.A. entitled "Operation Limitations" (Pls. Ex. 10, R. 440, Br. 32).

The policy does not say what is meant by "the operations authorized" or "the operations record of the aircraft." Since these expressions render the condition ambiguous and its meaning uncertain, the meaning most favorable to the insured must be applied, even though the insurer may have intended another meaning. Compare *Doke v. United Pac. Ins. Co.*, 15 Wn.(2d) 536, 544, 131 P.(2d) 436, 439.

It seems to us that "the operations authorized" means the operations authorized by the insurance policy, and that "the operations record of the aircraft" means the record of those operations kept by the airplane operator, *i.e.*, the operations log of the aircraft. The condition as a whole means that the aircraft will at all times be operated in accordance with the operations authorized by the policy and that the actual operations shall at all times accord with the record of them as kept in the log. The phrases "In accordance with the operations authorized" and "as set forth in the operations record of the aircraft" both modify "shall be operated at all times."

The insurance contract covers the airplane when operated for certain purposes and excludes coverage when it is used for others. See Section 8 (R. 43); General Exclusion 1-b and c (R. 44); Endorsement No. 3 (R. 39). This makes it important for the insurers to have available an accurate record of all operations. It is reasonable to assume that the purpose of General Condition 3 is to require the assured to operate the

plane in accordance with the operations authorized in the policy and put him on record as having done or not done so.

APPELLEES' CONSTRUCTION OF CONDITION 3 IS NOT TENABLE

Now we will take up the points discussed in our opening brief, consider appellees' answers or failure to answer and give reasons why their position seems to us untenable.

Our first proposition was that the purpose and effect of General Condition 3 is not to exclude coverage for assured's negligence but to prescribe certain duties of assured in event of damage. The first reason we gave in support of this proposition was that an interpretation excluding coverage for negligence would defeat the primary purpose of the policy (Br. 10).

In their answer appellees disregard the obvious, that the purpose of procuring insurance is ordinarily to secure protection against the consequences of negligence. This is a fundamental fact which courts have repeatedly stressed (our brief 19-20).

They likewise refuse to consider the policy as a whole. They confine their attention wholly to a few words taken in isolation.

They even disregard the point that the policy expressly covers damage caused by "frost," which includes icing (our brief 12).

We urged that if Condition 3 were construed as a covenant against negligent operation of the aircraft it would nullify Section I, the "Third Party Liability"

clause (12-14). Appellees shrink from this conclusion, knowing that they accepted \$2,370.05 each year from the insured for this coverage.

Commenting upon the District Judge's denial of reimbursement to the plaintiff administrator for damage done to King County's revetment hangar, appellees state:

“He could properly, and must have done so because of the assured's violation of General Conditions 1 and 2 * * *” (p. 41).

But we have seen that neither Condition 1 nor Condition 2 was violated, and the trial judge referred to neither in his opinion, findings of fact or conclusions of law. What he did was follow appellees' untenable construction of Condition 3 to its logical conclusion.

Appellees' position boils down to two propositions: (1) Condition 3 imposes a duty upon the assured at all times (pp. 37, 38) and is merely a positive way of saying he shall not be guilty of negligence (p. 48). (2) However, the policy insures against the claims of third parties irrespective of assured's negligence (pp. 41, 44).

These two propositions are inconsistent: If the words “due diligence” in Condition 3 are construed as a covenant against negligence in operating the aircraft, they nullify all third party liability coverage. This is so because (1) negligence in operating the airplane would void the policy (their brief 30), and (2) negligence in operating the airplane is the only thing that can give rise to third party liability.

Since appellees admit that it was not their intention that Condition 3 nullify third party coverage, it fol-

lows that they did not intend this condition to apply to negligence in the operation of the aircraft at all.

We submitted these related propositions: (1) Courts consistently effectuate intent and purpose of policy as gained from entire instrument; any ambiguity is resolved against insurer and absurdity avoided (pp. 14-17). (2) Conditions, exceptions and exclusions from coverage will be strictly construed against the insurer (pp. 17-19). (3) The language of Condition 3 is suited to requiring the assured to mitigate damage, but inept if its purpose is to exclude coverage for negligence in operating the aircraft (pp. 22-24).

Appellees answered this only by in effect splitting Condition 3 into two sentences (p. 37), quoting the words "due diligence" and the first clause of Condition 3 out of their context, as if they stood alone and were complete in themselves (pp. 18, 30, 35, 38, 41, 43, 48), and saying that the condition is "clear, plain and unambiguous and needs no construction" (pp. 18, 40, 43).

This disregards the principle (our brief 23) that words of general import (in the first clause of Condition 3) should be held to include only things similar in character to those specifically named (in the last clause of the condition).

Appellees say any other interpretation than the one they contend for renders the verb "avoid" in the first clause meaningless. We do not agree. We can see no reason why the assured could not, or should not, avoid loss of or damage to the aircraft and its equipment and

accessories, after the aircraft has sustained damage, by seeing that they are properly protected, guarded and cared for.

We submitted the proposition that the purpose and effect of General Condition 3 was to prescribe the duties of the assured with regard to mitigating loss or damage and ensuring the safety of the insured property in the event the aircraft is damaged (Br. 21-28).

We gave four reasons for this construction. The first was that with this meaning the condition serves a useful and practical purpose, protecting the interests of the insurer without forfeiting the rights of the assured (p. 21). Appellees' answer was that it was also useful to exclude negligence coverage (p. 47). They dress this up by saying that the purpose was to protect the insurer from "such wilful negligence and flagrant disregard of duty as was exhibited by the assured in this case" (p. 39). The policy makes no reference to wilful negligence or flagrant disregard of duty. If Condition 3 is a warranty against negligence in operating the aircraft it is a warranty against all such negligence, not merely wilful or flagrant negligence.

Appellees' answer to our second reason for the above construction, that the language is suited to that purpose but inept if given appellees' interpretation, was discussed above in connection with two related matters.

The third reason we gave was that the language relied upon to exclude insurance against negligence is in a part of the policy where it would not suggest that meaning to the assured (pp. 24-25).

Appellees' only answer to this is that the general conditions of the certificate are *on the same page* as the terms of the certificate and displayed as prominently thereon as any other part of the certificate. They ignore the fact that the words relied upon to emasculate or destroy the insurance coverage are part of a sentence buried in a section of the contract where one would not naturally look for language having that disastrous effect.

We also stated that appellees' construction of Condition 3 depends upon the location of one word "AND," and suggested a simple transposition (pp. 25-26).

Appellees' answer is that transposing the "AND" would amount to rewriting the contract and make the condition awkward, unnatural and in effect say the same thing twice (p. 47). We invite the court to compare the condition with this slight transposition (our brief 25-26) with the condition as it appears in the policy (our brief 7). Appellees ignore the rule (our brief 25) that in interpreting a contract words may be transposed to make the meaning clear and carry out the intent of the parties.

Appellees suggest that the premium would have been higher if they had not excluded negligence coverage (p. 44). There is no evidence of this in the policy or elsewhere. It is not standard practice (our brief 19). All other exclusions are carefully drawn and plainly labeled. If appellees actually based their premium on excluding negligence coverage is it reasonable that they would word that important exclusion so obscurely and put it in such an inappropriate place in the contract?

APPELLEES' AUTHORITIES ARE NOT PERTINENT

Appellees cite 11 cases holding that losses caused by the assured's negligence or lack of due care or diligence were not covered by the policies. These cases are *Isaacson Iron Works v. Ocean Acc., etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026; *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500; *Richelieu & O. Nav. Co. v. Boston M. Ins. Co.*, 136 U.S. 408, 10 S.Ct. 934, 34 L.ed. 398; *Chicago S.S. Lines v. U.S. Lloyds*, 12 F.(2d) 733 (cert. denied in 273 U.S. 698, 47 S.Ct. 94, 71 L.ed. 846); *Leatham Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 (F.(2d) 923; *Western Assur. Co. v. Shaw*, 11 F.(2d) 495; *Garcelon v. Comm. Travelers' Eastern Acci. Asso.*, 195 Mass. 531, 81 N.E. 201; *Morris v. Comm. Travelers' Eastern Acci. Asso.*, 98 N.E. 599; *Nichols v. Comm. Travelers' Eastern Acci. Asso.*, 109 N.E. 449; *Manter v. Boston Fire Ins. Co. (N.H.)* 35 Atl.(2d) 196; *Standard Life & Acc. Ins. Co. v. Jones*, 10 So. 530.

One need only read appellees' quotations (pp. 19-29) to see that all those cases are clearly distinguishable from this one on the same fundamental ground. In each of them the policy contained an express provision requiring due care or diligence or excluding liability for negligence *in doing the thing that caused the loss*.

We have seen that while Condition 3 of our policy required the assured to use due diligence, it did not require him to use due diligence in operating the airplane, which was the act that caused the loss. It only required him to use due diligence to avoid or diminish loss or damage to the insured property in the event of

the aircraft sustaining damage covered by the policy. A similar distinction was considered in *Rogers v. Aetna Ins. Co.*, 95 Fed. 103; Appellants' Br. 26.

Appellees cite 17 cases to support their statement that "A breach of a condition material to the risk avoids a policy of insurance" (pp. 33-35).

These cases are *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500; *Smith Lumber Co. v. Netherlands F. & L. Ins. Co.*, 135 Wash. 547, 238 Pac. 565; *Johnson v. Franklin Ins. Co.*, 90 Wash. 631, 156 Pac. 567; *Henslin v. H. S. Fire Ins. Co.*, 152 Wash. 637, 278 Pac. 702; *Ferguson v. Lumbermen's Ins. Co.*, 45 Wash. 209, 88 Pac. 128; *Clark v. Western Ins. Co.*, 168 Wash. 366, 12 P.(2d) 408; *Canton Ins. Off. v. Independent Trans. Co.*, 217 Fed. 213; *Georgian, etc. v. Glenn Falls Ins. Co.*, 21 Wn.(2d) 470, 151 P.(2d) 598; *Johnson v. Inland Empire, etc., Ins. Co.*, 155 Wash. 6, 283 Pac. 177; *Brehm Lbr. Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. 34; *Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society*, 146 Fed. 695; *Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 14 Sup. Ct. 379, 38 L. ed. 231; *Richardson v. Superior Fire Ins. Co.*, 192 Wash. 553, 74 P.(2d) 192; *Delaware Ins. Co. of Philadelphia v. Greer*, 120 Fed. 916, 57 C.C.A. 188, 61 L.R.A. 137; *Menger v. Inland Empire Ins. Co.*, 118 Wash. 514, 203 Pac. 934; *McKernan v. North River Ins. Co.*, 206 Fed. 984; *Neil Bros. Grain Co. v. Hartford Fire Ins. Co.*, 1 F.(2d) 904.

Not one of those cases sustains appellees' broad, general statement. The most any of them holds is that

breach of such a condition voids a policy *if the policy provides in express terms that the breach shall have that effect*. Every one of them contained a provision that the property was insured only while a certain state of facts existed or that the policy would be void if a specified state of facts existed or ceased to exist or if an express warranty or condition was violated.

The policy in this case contains no such provision with regard to either of the three general conditions upon which appellees rely. The only general condition containing such a provision is No. 9 (R. 44). This indicates that the others were not intended to have that effect. *Expressio unius est exclusio alterius*.

Port Blakely Mill Co. v. Springfield Etc. Ins. Co., 59 Wash. 501, 511-513; 110 Pac. 36, 40-41.

Of course what we have said in disposing of appellees' other citations applies equally to these. Even if it were admitted that there was lack of due diligence in operating the aircraft, that would not violate a condition of the policy, because the requirement of due care does not apply to such operation.

Appellees cite *McCoy v. Courtney*, 25 Wn.(2d), 956, 172 P.(2d) 596, holding that violation of law is negligence *per se*. We will show elsewhere that if there was any such violation it was not a cause of the accident. Even if it were otherwise it would be immaterial because the only negligence possible was in operating the aircraft and such negligence is not a defense. Compare *Central Manufacturers' Mut. Ins. Co. v. Elliott*, 177 F.(2d) 1011.

Appellees' quotations from 29 Am. Jur. 714 and 29

A.L.R. 714 (pp. 18-19) and the two Harter Act cases (p. 29) merely define the measure of due care when required by a policy or statute. They have no application here because the policy did not require due care in doing the thing that caused the loss, *i.e.*, operating the airplane.

Appellees cite *Isaacson Iron Works v. Ocean Acc., etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026, and *Riche-lieu & O., Nav. Co. v. Boston M. Ins. Co.*, 136 U.S. 408, 10 S.Ct. 934, 34 L.ed. 398, on the point that an assured has the burden of proving he has sustained a loss within the terms and conditions of the policy (p. 49). Appellants sustained that burden. The loss, which was admitted, was unquestionably covered by the insuring clauses of the policy. If appellees mean that appellants had the burden of proving that the assured used due diligence in operating the aircraft, the answers, in addition to the basic one that negligence in operating the plane is not a defense, are: (1) Negligence is an affirmative defense and the burden is upon the one asserting it. (2) Appellees having with appellants' approval assumed the burden, will be held to that position on appeal.

*Kentucky-Vermilion Mining & Concentrating
Co. v. Norwich Union Fire Ins. Society*
(C.C.A. 9) 146 Fed. 695.

In that case this court said:

“The general rule is that a party who, with the acquiescence of his adversary, assumes the burden of proof of an issue will be held to that position on appeal.”—*ibid*, 702.

“The burden is, of course, upon the insurer to

establish that insured's conduct was such as to come within the provisions of the contract excepting or limiting liability."—29 A.L.R. 715 (IV).

APPELLEES' POSITION IS NOT SUSTAINED BY THE EVIDENCE (Appellants' Br. 28-56)

At p. 36, appellees "caution the court to look to the record," saying we have made quotations "out of context" and argument "not borne out by the record." Elsewhere they charge "distortion" (53) and other unkind things. We have rechecked all record references in our opening brief, and invite the court to do so. What arouses appellee's complaints really is any attempt to separate wheat from chaff in the testimony of their witnesses.

Under a heading in our opening brief to the effect that the insurers tried but failed to establish the cause of the crash, we emphasized that the left turn of the plane off the runway is the unique feature of the accident requiring explanation (32-33). Appellees in effect agree, except they insist that the plane went off the runway with a gentle curve (51-52); we shall not quibble over these words.

Under four related headings we urged that the testimony of Mr. Vineyard, appellees' principal witness, amounted to the theory that there had been more ice on the left than upon the right wing, causing the left wing to stall and the plane to turn left off the runway (33-40). Appellees offer no direct answer to the analysis given, but quibble over detail.

Appellees really confirm our contention that Mr.

Vineyard finally renounced icing as a cause of the crash (our br. 35-37). They say:

“He stated right from the start that he did not examine the upper surface of the right wing and did not know how much ice was upon it. He did testify as an expert (R. 320) that *if* an airplane took off *with more ice on one wing than the other* that the one that had more ice on it would stall sooner than the other” (Appellees’ Br. 54; italics ours).

Since this same witness had testified that *the icing condition on the bottom of both wings was the same* (Appellants’ Br. 37), his testimony comes down to this: I don’t know whether there was more ice on the upper side of the left wing than on the upper side of the right wing, but if there was, the stalling of the left wing and plane’s left turn off the runway might be explained on that ground.

The “Testimony of Messrs. Miner and Flood as to Presence of Ice” was analyzed in our opening brief (40-41). Appellees assert that “Mr. Flood advised the assured, Leland, that he did not think the plane was in a safe condition to fly * * *” (p. 8). They charge that we “dispose of the expert testimony of Emmett Flood by an out of context quotation” (p. 57). We view such statements as smoke-screen laid over the point that Mr. Flood did not see the airplane at all after Mr. Miner’s removal of ice from it (Appellants’ Br. 40-41).

We analyzed the testimony of Professor Ganzer and Mr. Merrill under the heading “Remaining Opinion Testimony of Defendants as to Effect of Ice on an Airplane” (41-46). Appellees at p. 57 refer to the testi-

mony of Professor Ganzer, but add nothing to meet the point that his testimony is purely hypothetical (Appellants' Br. 42-43). As to Mr. Merrill's testimony, appellees again quibble on details (p. 58), but do not answer directly our analysis of it (Appellants' Br. 44-47). Appellees are silent on the point that Mr. Merrill testified that icing would not cause the left turn of the plane off the runway unless it is assumed, as the evidence does not show, that there was appreciably more ice on the left than on the right wing (Ibid. 46).

Appellees (9-11) refer to testimony of four student passengers on icing. They testified by deposition, with no cross examination. Yet not one of them bears out appellees' contention that there was more ice on the left wing than on the right (R. 382, 391, 398, 402).

At pages 46 to 49 we urged that "There was no Proof that There was any Overloading." We anticipated the argument offered by appellees on this point; yet they make scant if any answer. As we pointed out, the plane carried no more than the permitted number of passengers so that appellees' theory of overloading depends primarily upon proof of the weight of (1) fuel and (2) baggage on the plane. They set forth their material in a way best calculated to create an illusion of certainty (11-14), going so far as to say: (12)

"The undisputed evidence shows that there were 600 gallons of gasoline on board at the time of the attempted takeoff (R. 22-54-329-333). Computed as prescribed by regulation, this weighed 3600 *pounds*."

A check of the record cited shows the complete unsoundness of their position. The only relevant portion

of pages 22-54 amounts to a statement made by appellants, in response to a request for admissions, that they could *not* affirm or deny the number of gallons on the airplane because all operating personnel who knew anything about it had been killed. Pages 329-333 relate to the testimony of Mr. Vineyard in which the opinion is expressed that Mr. Chavers would have carried 600 gallons on the flight if he stated his intention of so doing in the flight plan filed a few hours earlier. Appellees fail to comment on the complete inadequacy of this testimony pointed out in our opening brief (47-48). Nor do they refer to the fact, previously mentioned, that this same witness conceded that he did not have any basis for "any honest, reliable judgment that there was any overloading" (*Ibid.* 48).

It is obvious, then, that there is no basis for appellees' claim that the gasoline "weighed 3,600 pounds."

Nor have they any more cogent evidence as to the weight of the baggage. They refer to two student-passengers who helped load a part but not all of it and who did not weigh any of it (12-13). They then refer to the opinion testimony of a third student, Mr. Kendall. We have referred to his testimony, which amounts to an opinion as to the weight of unknown contents of baggage which he had neither lifted nor weighed (48-49).

In our opening brief it was urged that "There was no Evidence that Fog Caused the Accident" (49-52). As if they really did not have confidence in icing as the cause, appellees refer to the left turn of the plane off the runway and then say: "One must inevitably conclude, as the District Court apparently did, that the pilot couldn't see where he was going" (52-53). They

repeat this view at pp. 59, 61. The District Judge, however, never even “apparently” found that fog caused the crash. His findings relate to icing and do not mention fog (R. 89-93).

They then say it would not have been necessary to introduce opinion testimony on this matter, since any layman could conclude it was because of fog that the plane adopted a heading left off the runway after its first 800 feet of run (59). We have shown that a layman would conclude the opposite (Br. 49-50). Furthermore, appellees did call expert witnesses, whether it was necessary for them to do so or not. These witnesses in testifying that the cause was icing, “possibly” overloading (Vineyard) and taking the airplane off before it had acquired flying speed (Merrill) by inference ruled out fog.

Appellees do not comment upon the undisputed testimony that an instrument takeoff, without visual reference at all to outside objects, is safe, and that Mr. Chavers was certified for this type of takeoff (our brief 51-52).

Appellees’ position on this point is inconsistent with the report of the Civil Aeronautics Board, which appellees say that the District Court should have admitted in evidence (Br. 62). On the matter of fog this report stated:

“It is also possible that the pilot did not have sufficient visibility to hold the airplane on the straight course; *however, his pilot experience included a reasonable amount of training, and in view of this it can be reasonably expected that he would be able to continue to takeoff successfully by refer-*

ence to instruments if all outside visible reference were lost” (R. 303-304; italics ours).

We pointed out in our opening brief that “Any Findings of Negligence Must Be Based Upon ‘*Res Ipsa Loquitur*’ ” (Br. 54-56). The decision of the Superior Court of King County was referred to wherein the court stated that “whether the swerving of the plane was due to ice upon the wings is in my opinion speculative” (Br. 55). Appellees counter by saying that this decision should not have been received in evidence, without meeting the point that the opinion and other portions of the court’s record in the suit brought by King County for damage to its revetment hangar were pertinent to appellants’ claim under its third party liability clause.

Appellees then say that the report of the Civil Aeronautics Board (Def’s. Ex. A-13, R. 293-308) should have been received in evidence (62). The trial court’s ruling on this was correct, by virtue of the express provisions of 49 U.S.C.A., Section 581. It is undisputed that at the hearing pursuant to which the report was prepared counsel for appellants were denied the privilege both of direct and cross-examination, being permitted only to hand up questions to the hearings’ officer who might ask them or not as he saw fit (R. 312). Even apart from the statute cited, the report would be hearsay. 153 A.L.R. 163, 166 *et seq.* “Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property.”

We submitted that the trial court erred in excluding evidence and rejecting plaintiffs’ offer of proof relating to weather and air traffic conditions (Br. 56-60). Appel-

lees in answering this argument (63-67) do not meet the central point, that the evidence was excluded even while the trial court held it to be material, for the sole reason that it was not proper rebuttal. Appellees submit no reason why it was not proper rebuttal. That the offer of proof should have been received is apparent from reading it (Appellants' Br. 58-60). This offer of proof included the point that at the moment before take-off the pilot reported he could see the green lights at the opposite end of the runway, 5000 or more feet away, and that the control tower then cleared him for take-off (Appellants' Br. 59-60).

It is respectfully submitted that the judgment of the District Court should be reversed with direction that plaintiff have judgment for the amounts asked in the amended complaint, including interest at 6% from date of loss and costs. What the amount of this judgment should be is analyzed at pages 60 to 62 of our opening brief. Appellees have taken no exception to the computation therein set forth.

Respectfully submitted,

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Attorneys for R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, as Successor Receiver for Atlantic and Pacific Airlines.

United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as
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Deceased, and C. W. BREAKIRON, Successor Receiver
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VS.

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ANCE COMPANY, LIMITED, subscribing underwriting
members of Lloyd's, London, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING

J. CHARLES DENNIS
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FILED

535 Central Building,
Seattle 4, Washington.

MAY 27 1952

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No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING

Appellants respectfully petition the court for a re-hearing upon the following grounds:

1. The court decided an important question of local law in a way that probably is in conflict with applicable local decisions.

(This court's attention was not called to the fact that the Washington court, *en banc*, had reversed a departmental holding on the particular question.)

2. The court did not pass upon appellants' contention that appellees failed to sustain the burden of proving their affirmative defense that the insured was

guilty of negligence which was the proximate cause of the loss insured against.

3. The court did not pass upon appellants' contention that the trial court erred in excluding evidence and rejecting plaintiffs' offer of proof relating to weather and air traffic conditions.

ARGUMENT

This is the very exceptional case wherein a lawyer's inclination to advise as to the futility of a petition for rehearing is overcome by his conviction that a fundamentally wrong decision has been rendered.

It is not merely the interests of the litigants that makes it important for a correction of the decision to be made. If allowed to stand it will have a disastrous effect upon the construction of insurance policies.

Ground 1: The Court Decided an Important Question of Local Law in a Way that Probably Is in Conflict with Applicable Local Decisions.

Scope and Basis of Decision

The court had before it a condition of a kind commonly found in insurance policies. It provided for mitigation of damages in event of a loss covered by the policy. The court construed this condition out of context as a general warranty against negligence. This violated basic principles of insurance law hereinafter discussed, — principles that have been applied consistently by the courts of all jurisdictions, including Washington State.

It will be recalled that this was a suit on a policy of

aircraft insurance for loss of plaintiffs' airplane in an attempted take-off at Boeing Field, Seattle. The insuring clause of the policy reads:

"SECTION 1—LOSS OR DAMAGE TO AIRCRAFT

"A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost, wear and tear, gradual deterioration, mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Underwriters that such loss or damage was caused by a servant or agents or person under the control of the Assured."

It is not suggested by this court nor even contended by appellees that the insuring clause does not cover the loss sustained. Such a contention would be completely untenable in view of the broad language employed.

The only provision in the entire policy relied upon to exclude coverage for loss allegedly caused by the negligence of the assured is Condition 3, which reads:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of

the damaged Aircraft and its equipment and accessories.” ’

Appellees (the insurers) refused to pay for the loss of the aircraft and appellants sued on the policy.

The defense which formed the basis of the decision denying recovery to the assured was the affirmative one (a) that Condition 3 quoted above excluded from the coverage of the policy any loss of the airplane caused by negligence of the assured and (b) that negligence of the assured caused the loss.

Appellants contended that Condition 3 was not intended to exclude insurance coverage as to any loss or damage caused by the negligence of the assured, but was designed to prescribe the duties of the assured with regard to mitigating loss or damage and securing the safety of the aircraft in event of an accident (10)*; that a fair reading of the condition would compel the adoption of this construction of it; that this construction accomplishes a reasonable result in that it would serve a useful purpose without forfeiting the rights of the assured to the protection which he would normally expect from such a policy (21); that the policy must be construed as a whole and in the light of its intent and purpose as gathered from the entire instrument (14); that conditions, exceptions and exclusions from coverage will be construed strictly against the insurer (17, 18); and where language of a policy is doubtful it should be construed against the insurers who wrote it (14).

*Unless otherwise indicated, all numerical references herein are to the pages of the “Brief of Appellants.”

This court referred to the above arguments without comment other than to say that appellants called attention to numerous decisions supporting the two last mentioned propositions (Opinion 3, 4).

Appellants also argued, and cited many authorities from the State of Washington and elsewhere supporting the following propositions: that loss of the assured's property caused by his own negligence is covered in such a policy unless excluded by clear and explicit language (19); that an interpretation excluding such coverage would defeat the primary purpose of the policy (10); that a clumsy arrangement of words will not be allowed to contravene a reasonable construction according to the intention (15); that if one construction of an insurance policy would contradict its general purpose this is strong evidence that such a construction was not intended by the parties (15); that if a policy will fairly admit of two constructions the one should be adopted that will indemnify the assured even though the insurer may have intended another meaning (16, 17); and that giving the condition the meaning contended for by appellants accords with the rule, frequently applied in construing insurance policies, that words of general import should be held to include only things similar in character to those specifically named (23). The decision makes no reference to any of these arguments.

Appellants referred to the fact that the policy expressly insured against accidental damage caused by frost, which the trial court found was the cause of the accident (12). They also pointed out that the language relied on to exclude insurance is in a part of the

policy where it would not suggest that meaning to the assured (24) and that a slight transposition of the single word “and” resolves all ambiguity in favor of the assured. Authority, including the Washington Supreme Court, was cited holding that in interpreting a contract words may be transposed to make the meaning clear and carry out the intent of the parties (25). The opinion contains no mention of any of these points.

This court did not question any of the above propositions and apparently considered them correct as matters of general law. The basis of the decision seems to have been a conclusion on the part of the court that the law relating to construction of insurance contracts is different in Washington from the general law on the subject as developed in other jurisdictions. The only authorities cited for this conclusion are *Isaacson Iron Works v. Ocean Acc. etc. Corp.*, 191 Wash. 221, 70 P. 2d 1026, and *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781.

The *Isaacson Iron Works* case was the one mainly relied on. The court states that the policy in that case “contained a provision strikingly like that in the matter now before us” (Decision p. 5) and reaches the conclusion that “We must, we think, follow the *Isaacson Iron Works* case, *supra*” (p. 7).

The court concluded its consideration of the *Isaacson Iron Works* case with a statement so sweeping in scope that it is likely to be often quoted by insurers desiring to escape liability on policies written in the State of Washington:

“That decision appears to be in line with what

we might call a 'literal' rule of construction of insurance policies which appears to be the established rule of the State of Washington." (p. 5)

In the remainder of this part of our argument we expect to show that:

1. The Washington Supreme Court, in an *en banc* rehearing, reversed a departmental decision on this very point and expressly repudiated any rule of literal construction of insurance contracts.

2. The *Isaacson Iron Works* case is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the State of Washington.

3. Cases cited in the *Isaacson Iron Works* case show that there is no such rule.

4. Washington cases decided after the *Isaacson Iron Works* case reject any rule of literal construction.

5. The *Hamilton Trucking Service* case has no controlling effect in this case. It does not indicate in any way that there is a "'literal' rule of construction of insurance policies" in the State of Washington.

1. The Washington supreme court, in an *en banc* rehearing, reversed a departmental decision on this very point and expressly repudiated any rule of literal construction of insurance contracts.

This occurred in

Port Blakely Mill Co. v. Springfield, etc. Ins. Co., 59 Wash. 501, 110 Pac. 36.

This case involved a suit on a fire insurance policy. The case is noteworthy for several features: (1) The

provision construed by the court was expressly called a "warranty," not a condition, in the policy. (2) The words of the provision if literally construed would clearly have prevented recovery. The words were:

"Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order." (59 Wash. at p. 503, 110 Pac. at p. 37)

The facts were that the sprinkler system had not "at all times" been maintained in good working order. It was not in operation for a period prior to the fire, but was operating when the fire occurred. (3) The Washington court in a four to one departmental opinion had granted judgment for defendant, upon the ground that the literal wording of the policy precluded recovery (56 Wash. 681, 106 Pac. 194).

The Washington court granted a petition for rehearing, and, sitting *en banc*, reversed the departmental decision. With only one justice dissenting, it held that the plaintiff was entitled to recover. The court used the following language which is worthy of special note:

"It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetich of words, expressions, and definitions, and attributing potent magic to the word 'warranty,' or words of similar import, comes like a refreshing breeze from the sea of judicial enlightenment, the voice of the supreme court of Kentucky, in *Germania*

Ins. Co. v. Rudwig, 80 Ky. 223, where the rule is condemned.” (p. 519 of 59 Wash., p. 43 of 110 Pac.)

The *Port Blakely Mill Co.* case is noteworthy for a further reason. There the court pointed out that the principle “*expressio unius est exclusio alterius*” applied because certain conditions of the policy provided specifically that their breach would void the policy, whereas the provision construed by the court did not so provide. This is true in the instant case. Condition 9 provided specifically that its breach would void the policy. Condition 3 did not so provide nor was its subject matter included in the “General Exclusions” which specifically listed 6 kinds of loss and damage that the policy “does not cover” (R. 44). This language of the Washington court in the *Port Blakely Mill Co.* case therefore applies:

“In the *Hart* case, *supra*, certain similar conditions were reviewed, and the court held that, under the rule of *expressio unius est exclusio alterius*, the particular clause could not be construed to be a warranty. That rule applies with especial clearness to this case, where so many provisions provide especially that the contract shall be void if they are not complied with, and where there is no such provision in the representation relied upon.” (59 Wash. 501 at pp. 512-513, 110 Pac. at p. 40)

The *Port Blakely Mill Co.* case was cited with approval by the Washington court three years after its *Isaacson Iron Works* decision, in

Kane v. The Order of United Commercial Travelers of America, 3 Wn.2d 355, 361, 100 P.2d 1036.

2. *Isaacson Iron Works v. Ocean Acc. etc. Ins. Co.*, 191 Wash. 221, 70 P.2d 1026, is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the state of Washington.

Although this court relied upon such a supposed rule in construing Condition 3, we think it recognized, in construing Conditions 1 and 2 of the policy that the rule is otherwise. The court refused to give those conditions the meaning contended for by appellees and construed them strictly against the insurer. It rejected appellee's contention that the certificate of airworthiness required by Condition 2 was invalidated by asserted overloading. It employed language in reaching this result which, with substitution only of the words italicized below, applies squarely as to Condition 3:

“Had it been intended to make this *third* condition one which prohibited *negligence* or other violations of applicable regulations, it would have been a simple matter to find appropriate words to say so.” (pp. 7-8)

This court also rejected appellees' contention that the insured must have known that Condition 2 was intended to refer to “operation limitations” as defined in Regulation 13 of the Civil Aeronautics Board. The court said:

“We think that the answer to this suggestion must be that the condition did not so state, and we are not permitted to read into the insurance certificate something which the parties may be supposed to have intended but which they have not stated.” (p. 8)

In connection with the construction of Condition 3

it is contended in effect that the insured must have known that this condition, although it dealt primarily with an entirely different subject and was not in the "General Exclusions", was intended to exclude all insurance against loss caused by negligence of the insured in operating the airplane.

The language last above quoted is as applicable to the construction of Condition 3 as it is to the construction of Condition 2.

We think this shows an inherent inconsistency in the decision which can not help leading to confusion unless corrected.

We probably should have said more about the *Isaacson Iron Works* case in our reply brief. It seemed to us that the case was so clearly distinguishable from this one that it was sufficient, in the limited space available, to point out a basic distinction that was common to that and ten other cases cited by appellees (Reply Br. 9). We referred to the case again while discussing the fact that appellants sustained the burden of proving that the loss sustained was within the terms of the policy (Reply Br. 12).

It was not suggested by appellees that there is a literal rule of construction of insurance contracts in the State of Washington, so that possibility was not discussed either in the briefs or the oral argument. We submit that this court should not announce the existence of a rule which would be such a radical departure from the established principles of insurance law until the views of both parties have been presented with that particular point in mind.

There are several fundamental distinctions between the provision discussed in the *Isaacson Iron Works* case and the language relied on to exclude coverage in this case.

1. The most basic distinction between the *Isaacson Iron Works* case and this one is that that case dealt with a provision that was not capable of being construed, while this deals with one that is. The question there was not whether the provision should be construed "literally" as distinguished from liberally, but whether it should be entirely eliminated. The provision was so plain, simple and unambiguous that there was nothing to construe. The Washington court said that it "must either be given effect according to its plain language, or by judicial interpretation written out entirely" (p. 228 of 191 Wash. p. 1030 of 70 P. 2d). In contrast, Condition 3 in the present case is, to say the least, capable of being given the meaning that appellants say it was intended to have. The *Isaacson Iron Works* case does not purport to say that a policy must be given a construction favorable to the insurer if it is capable of such meaning. The rule, in Washington as everywhere else, is that any language limiting the liability of the insurer must be given as narrow and restricted a meaning as it is capable of.

2. The provision in the *Isaacson Iron Works* case was a simple sentence devoted to the subject of negligence: "The assured agrees to use due diligence and exercise reasonable care to avoid doing damage to the property of others." Notice the standard phraseology of negligence that is employed.

In the instant case no language as to the "exercise

of reasonable care" is employed at all. The phrase "due diligence" is used, but it is related to the performance of affirmative acts by the assured similar to those commonly required in a clause relating to mitigation of damages. Such acts would not be specified in a clause intended as a warranty covering "exercise of due care" in the avoidance of damage generally. The language of Condition 3 would be comparable to that in the *Isaacson Iron Works* case only if it expressly required the assured to exercise due care in all operations of the airplane. That language is not in Condition 3 and should not be read into it unless we are prepared to emasculate the policy and lay a new basis for the defeat of the assured under any insurance policy containing a clause for the mitigation of damage.

3. So far as the record shows, the language relied on to exclude coverage in the *Isaacson Iron Works* case was in the part of the policy where one would expect to find such exclusions and not buried among a number of general conditions dealing with other matters as was done here (24).

4. We have noted that appellees' entire case depends upon the placement of a single word "and" in Condition 3; that a judicially approved transposition of this single word resolves any ambiguity that might exist in Condition 3 *in favor of the assured* (24-26). This is not applicable to the language in the *Isaacson Iron Works* case.

The only similarity between the *Isaacson Iron Works* case and this one appears to be a superficial similarity between the words of the provision referred to in that case and some of the words of Condition 3

if the latter are read out of their context without any reference to the policy as a whole or even to the rest of the sentence of which they are a part.

It seems clear that the *Isaacson Iron Works* case does not announce any "rule of literal construction" of insurance policies. Instead, the case is authority for the view that the same principles are applicable thereto as control the construction of contracts generally. The court said:

"This court has laid down the rule that, in construing policies of insurance the general rules for construction of contracts apply." (191 Wash. at p. 227, 70 P.2d at p. 1029)

3. Cases cited in the *Isaacson Iron Works* case show that there is no such rule.

Three cases cited in the *Isaacson Iron Works* case show clearly that there is no such thing as a literal rule of construction of insurance contracts in the State of Washington; that the rules for construing such contracts are the same in Washington as everywhere else. These cases are:

Maylon v. Ocean Accident & Guarantee Corp., 149 Wash. 70, 270 Pac. 96;

Ragley v. Northwestern Nat. Ins. Co., 151 Wash. 545, 276 Pac. 537;

Brown v. Northwestern Mutual Fire Assn., 176 Wash. 693, 30 P.2d 640.

In *Ragley v. Northwestern Nat. Ins. Co.*, *supra*, 151 Wash. 545, 276 Pac. 537, the court expressly held that a provision in an insurance policy should not be read

literally. The case is particularly significant because the court quoted other provisions which expressly stated that their violation would void the policy and then said:

“We quote these specific conditions as bearing upon the question of whether or not the general words, above quoted, specifying the insurance ‘while occupied only for dwelling house purposes,’ shall be read literally and unqualifiedly.”

After holding that they should not be so read, the court said:

“This conclusion finds support in the rule adopted by this court, in harmony with the rule generally adhered to by the courts, that uncertainty of application in the meaning of the language of an insurance policy, especially language therein intended to provide for forfeiture of the rights of the insured, is to be construed favorably to the insured.” (p. 548 of 151 Wash., p. 538 of 276 Pac.)

In *Maylon v. Ocean Accident & Guarantee Corp.*, *supra*, 149 Wash. 70, 270 Pac. 96, the court refused to give a literal or strict construction to a provision in a policy insuring the contents of a safe. The policy provided that the insurer should not be liable for loss of money from within any safe containing a chest or compartment of any description unless both the safe and the chest or compartment were entered by actual force and violence leaving marks thereon. A steel chest was kept in the safe but the insured never locked it and habitually kept their money in drawers, pigeon holes or compartments which were opened by opening the main doors of the safe. The money lost was taken

from such compartments and not from the inner chest. The court referred to another provision of the policy which described the safe as burglar-proof as distinguished from fire-proof or fire-proof with burglar-proof chest and said that this rendered the presence or absence of an inner chest wholly immaterial. The court said:

“What was insured was the contents of a burglar-proof safe, having walls and doors as specified, and the earlier words of the policy, ‘within any safe containing a chest,’ do not apply; those words being intended only to apply to class 3, i.e., ‘fire-proof safe with burglar-proof chest’.” (p. 74 of 149 Wash., p. 98 of 270 Pac.)

The court also said that

“if a policy be uncertain or ambiguous it must be construed strictly against the insurer under all authority * * *. There being no clear and unambiguous provisions in the policy here considered limiting liability only to the contents of an inner chest, or requiring the insured to keep the property in such inner chest, the judgment appealed from is right and it is therefore affirmed.” (pp. 74, 75 of 149 Wash., p. 98 of 270 Pac.)

In *Brown v. Northwestern Mutual Fire Assn.*, *supra*, 176 Wash. 696, 30 P.2d 640, the court again applied the same principles, saying:

“* * * it is the universal rule that insurance policies are strictly construed against the insurer and liberally construed in favor of the insured.” (p. 700 of 176 Wash., p. 642 of 30 P.2d)

4. Washington cases decided after the *Isaacson Iron Works* case reject any rule of literal construction.

The Supreme Court of Washington has rendered a number of decisions in which any "literal rule of construction of insurance policies" is rejected in the strongest possible terms. This court, in discussing Condition 3, did not refer to any of these decisions. We have discussed the *Port Blakely Mill Co.* case, in which a departmental decision was reversed on this point. We have also seen that the very cases cited in the *Isaacson Iron Works* case show that there is no such rule. Other cases, decided after the *Isaacson Iron Works* case, deal explicitly with this point and set forth the reasons for the Washington court's view. One such case, to which we have already referred, is

Kane v. The Order of United Commercial Travelers of America, 3 Wn.2d 355, 100 P.2d 1036.

Here suit was brought upon a health and accident insurance certificate for death resulting from pneumonia. The certificate provided that the insured should not be liable for any "infection". The insurer contended that medical authorities generally classify pneumonia as a species of infection. The Supreme Court held that the word "infection" is susceptible of another meaning on the part of laymen so as not to include pneumonia, and used this strong language, buttressed by many citations:

"(1) It is the established rule in this and many other states that, where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, that mean-

ing and construction most favorable to the insured must be applied even though the insurer may have intended another meaning; because the insurer, and not the insured, is the author of the instrument. (citations)” (3 Wn.2d 355 at p. 359-360, 100 P.2d at p. 1038)

The following cases, all subsequent to the *Isaacson Iron Works* decision, support the same view:

Jack v. Standard Marine Insurance Co. (1949) 33 Wn.2d 265, 205 P.2d 351;

Handley v. Oakley (1941) 10 Wn.2d 396, 116 P.2d 833;

Doke v. United Pacific Insurance Co. (1942) 15 Wn.2d 536, 131 P.2d 436.

The case of *Jack v. Standard Marine Insurance Co.*, 33 Wn.2d 265, *supra*, is illustrative. Here the policy covered a diesel shovel against “upset or overturning.” The shovel in question, while ascending an incline, was damaged when its boom fell over backwards and came to rest on top of the cab of the machine. This caused the machine to tip backwards with its front end raised about three feet off the ground. Now, under any rule of literal construction, there clearly was no “upset or overturning” to bring the situation within the coverage of the policy. In spite of strong argument from the insurer to that effect, the court construed this language with reference to the policy as a whole and affirmed a judgment for plaintiff. The court cited the earlier case of *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 294 Pac. 585, reproducing the following quotation therefrom:

“There is another principle applying to contracts of insurance to the effect that, if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured; and will be liberally construed in favor of the object to be accomplished, and *conditions and provisions therein will be strictly construed against the insurer, as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice.*” (33 Wn.2d at p. 271, 205 P.2d at p. 354)

5. *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781, has no controlling effect in this case. It does not indicate in any way that there is a “‘literal’ rule of construction of insurance policies” in the state of Washington.

The only case other than the *Isaacson Iron Works* case that is cited by the court as illustrative of a supposed “rule of literal construction” is *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781. This court, in summarizing that decision, does not refer to the most significant provision in the insurance policy actually before the court that governed the holding which it announced.

The policy in that case insured against “(c) Accidental collision of the motor truck or trailer with any other automobile, vehicle or object” (237 P.2d, p. 782). This court summarizes the holding of the Washington court as though this were the only provision in the policy that was applicable. However, it was another provision in the policy before the Washington court which governed the collision of the “contents” or load on the

truck with any other object. This provision expressly confined coverage to

“(a) * * * collision of the contents on the Assured’s vehicle with any other vehicle or object *due to overwidth or overheight of load as may be defined by law, it being warranted the Assured will operate under special statutory requirements of the State Laws.*” (Italics ours; *ibid*, p. 783)

The Washington court denied recovery in a collision between the load on a truck and an underpass *upon the express ground that the collision was not “due to overwidth or overheight of load as may be defined by law” so as to come within the foregoing provision of the policy.* The court stated:

“By its plain terms, the risks assumed are accidental collision between the truck upon which the property is being carried and some other object, and a collision between the property covered and some other object due to the width or height of the load being in excess of that limited by law. Rem. Rev. Stat., Vol. 7A, Sec. 6360-48 (P.P.C., Sec. 292-3) fixes the maximum height of a load at twelve feet and six inches above the level surface upon which the vehicle stands. The load on the respondent’s truck was twelve feet and three inches in height. Endorsement No. 1, being limited to overheight loads, did not cover the load on respondent’s truck.” (*ibid*, p. 783)

A further feature distinguishing the *Hamilton Trucking Service* case from the instant one is that the language limiting coverage to oversize loads only was set forth *in the insuring clause of the policy.* What the insured urged the Washington court to do was to consider the supposed purpose of the policy to the ex-

tent of disregarding the plain limitation of coverage to oversize loads. No ambiguity was presented.

The policy in that case presented no question as to the construction of a condition relied on to take away the coverage given by the insuring clause as is the case here.

This court, in commenting upon the *Hamilton Trucking* case stressed the quotation in which the Washington court refers to cases that it refused to follow from seven states in which recovery was permitted under similarly worded policies although the collision was of the load with another object (Decision, 6). Such language must have influenced this court in inferring that the Washington court has adopted a "rule of literal construction." Such a conclusion can not be drawn from the statement referred to. Even if it is assumed that seven other jurisdictions emphasized the purpose underlying policies containing language similar to that above noted to the point of disregarding limitations in the insuring clause, it would be a plain non-sequitur to conclude that the Washington court adopted any "rule of literal construction."

What the court in the *Hamilton Trucking* case said, in effect, was that it would not find ambiguity where none existed in order to construe the policy in favor of the assured. Such an observation was proper as to the language before the court; we would not urge any other view. However, this is a far cry from construing a mitigation of damage clause so broadly as to defeat recovery for loss resulting from negligence of the insured in operating the airplane.

Ground 2: The Court Did Not Pass Upon Appellants' Contention that Appellees Failed to Sustain the Burden of Proving Their Affirmative Defense that the Insured Was Guilty of Negligence Which Was the Proximate Cause of the Loss Insured Against.

This court's treatment of Condition 3 is inconsistent with views it expressed as to Conditions 1 and 2. The court stated as to the latter:

"Conditions such as those we are here considering are in the nature of conditions subsequent, and the burden is upon the insurer to prove that they have been breached. (citations) We think such burden has not been sustained here." (Decision, pp. 8-9)

Since that statement of the law applies also to Condition 3, how could it be doubted that it was incumbent upon the insured to prove not only that there was negligence of the insured but also that such negligence caused the loss? The insurers themselves recognized this point, by pleading this defense affirmatively and then assuming the burden of proving it at the trial.

The Washington court in its *en banc* decision in the *Port Blakely Mill Co.* case rejected the view previously adopted in its departmental opinion, that breach of the obligation to maintain the sprinkler system "at all times" precluded recovery even though the fire was not shown to have been caused by such breach, stating:

"This rule seems to be opposed to our primary conception of fair dealing, is not practiced or tolerated in our everyday affairs with each other, is

not a commendable rule of action under any circumstances, and is diametrically opposed to the general rule that only such damages can be recovered from the breach of a contract as are shown to be the result of such breach. This rule has stood the test of time, because it is based upon common sense and fair dealing, and no court has ever felt called upon to apologize for it or distinguish it out of existence.” (59 Wash. at 505, 110 Pac. at 38)

This court has not commented at all on the important question whether the evidence sustained the finding of the trial court to the effect that the crash of the insured’s aircraft was caused by icing (Finding IX, decision p. 3). In our briefs we stressed that the testimony of defendants’ witnesses themselves shows without question that they renounced this theory; that there is absolutely no valid basis in the record for such a finding (30-46, Reply Brief pp. 13-18). We have shown that the same is true as to asserted overloading and weather conditions (46-56, Reply Brief 13 *et seq.*). Both sides briefed this question.

There are two different points which we probably should have stressed more in our briefs in connection with this subject matter:

(1) Appellees at the trial assumed the burden of proving their affirmative defense, and of establishing the cause of the crash through their expert witnesses. This court has held squarely that where appellees, with appellants’ approval, assumed such a burden they will be held to that position on appeal:

Kentucky-Virmilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society (C.C.A. 9) 146 Fed. 695.

This court stated therein:

“The general rule is that a party who, with the acquiescence of his adversary, assumes the burden of proof of an issue will be held to that position on appeal.” (*Ibid*, 702)

Consequently, there can be no serious question but that if the record fails to sustain appellees in their contention that breach of Condition 3 caused the crash, appellants are entitled to reversal wholly irrespective of the disposition by this court of Question 1. Can it be denied that this court should have discussed Question 2 in its decision?

(2) To reach the result contended for by appellees and defeat recovery on the policy for breach of Condition 3, it is necessary to accept the broad, sweeping proposition which appellees advance, that “A breach of a Condition Material to the Risk Voids a Policy of Insurance” (Br. of Appellees, pp. 33-37). What appellees really contend is that the same consequence would follow from breach of Condition 3 as would result from a breach of warranty.

The decision of this court would probably be construed as an implicit approval of that proposition. If so, the decision would constitute a most regrettable innovation in insurance law. There is not a single case cited by appellees to sustain that position. Seventeen cases are listed by them under the proposition above noted, which on first glance might appear to

lend support to it. A reading of these cases should leave no doubt whatsoever that they do not support such a proposition in the slightest. Most of them turn upon an express provision that "the policy is void" if the insured property is not located at or is removed from a stated location, or if the insured plant is idle more than a specified time, or if foreclosure proceedings are started, or if some other, reasonable, contingency occurs.

All of the remaining cases listed by appellees, without exception, pertain to a warranty clearly labeled as such, and do not pertain at all to the consequences of breach of condition.

(3) Other authorities cited by appellees elsewhere in their brief to sustain their argument that breach of Condition 3 should defeat recovery serve only to illustrate further the complete inapplicability of any authority available to them. Thus, appellees cite as a leading authority *Richelieu & O. Nav. Co. v. Boston, etc. Ins. Co.*, 136 U.S. 408, 10 S. Ct. 934 (Br. of Appellees, p. 23). This case very clearly turns upon special provisions in an insurance policy relating to seaworthiness and errors of navigation. More importantly, this and other similar cases cited by appellees (Br. 23-25) relate to collisions of vessels on the high seas, and it is clear that *what is involved is a principle peculiar to maritime law*. That principle, unlike the usual law of proximate cause, makes a vessel liable for a marine collision or accident, or jointly responsible therefor, if it violated an applicable maritime regulation even though such was not the prox-

mate cause of the collision or accident. The following cases recognize that the *Richelieu* case and kindred decisions are applicable only in maritime law for the reason indicated:

N. Y. & Cuba Co. v. Cont. Ins. Co., 117 F.2d 404;

The Aakre (C.C.A. 2) 122 F.2d 469;

Peoples Coal Co. v. Second Pool Coal Co.
(Dist. Ct., Pa.) 181 Fed. 609.

Ground 3: The Court Did Not Pass Upon Appellants' Contention that the Trial Court Erred in Excluding Evidence and Rejecting Plaintiffs' Offer of Proof Relating to Weather and Air Traffic Conditions.

This question was discussed by both sides in their briefs (Appellants' Br. 56, Appellees' Br. 63). It presents a separate and independent issue. It involves the propriety of rulings made by the trial court excluding certain evidence regarded by the court itself as material, and rejecting an offer of proof made by plaintiffs relating thereto (56-60). This offer of proof was to the effect that immediately prior to the accident other scheduled and non-scheduled airliners had been taking off from the same runway as the insured aircraft; that their pilots had found runway and weather conditions safe for take-off; that the pilot of the insured aircraft just a moment before take-off reported that he could see the runway lights visible at the opposite end of the runway over 5000 feet away, and that he was cleared for take-off by the control tower (58-60).

Surely this is a case where a rehearing should be had to keep consistency in the law and do justice between the parties.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Attorneys for R. P. Jandl, as Administrator of the Estate of William F. Leland, deceased, and C. W. Breakiron, as Successor Receiver for Atlantic and Pacific Airlines.

CERTIFICATE OF COUNSEL

JACK R. CLUCK, one of the counsel for the above named appellants and petitioners, certifies that in his judgment the petition for rehearing which accompanies this certificate is well-founded and that it is not interposed for delay.

EXECUTED this 22nd day of May, 1952.

JACK R. CLUCK

United States Court of Appeals
For the Ninth Circuit

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Administrator of the Estate of William F. Leland,
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vs.

EAGLE STAR INSURANCE COMPANY, LIMITED; ORION
INSURANCE COMPANY, LIMITED; THE DRAKE INSUR-
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members of Lloyd's, London, *Appellees.*

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**APPELLEES' REQUEST FOR LEAVE TO FILE
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REHEARING**

and

**APPELLEES' ANSWER TO ARGUMENT CONTAINED
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MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

812 Hoge Building,
Seattle 4, Washington.

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No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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**APPELLEES' REQUEST FOR LEAVE TO FILE
ARGUMENT IN ANSWER TO ARGUMENT
IN APPELLANTS' PETITION FOR
REHEARING**

In view of the fact that Appellants have made an
extensive argument in their petition for rehearing,
Appellees request leave of the court to answer the
argument contained in the petition for rehearing.

Respectfully requested,

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

United States Court of Appeals

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ITED; ORION INSURANCE COMPANY,
LIMITED, THE DRAKE INSURANCE COM-
PANY, LIMITED, subscribing underwrit-
ing members of Lloyd's, London,
Appellees.

No. 13122

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLEES' ANSWER TO ARGUMENT CONTAINED IN APPELLANTS' PETITION FOR REHEARING

Appellants' argument on their petition for rehear-
ing, when shorn of the impressive sounding verbiage
with which it is submitted, amounts to merely this:

1. The sentence of the Court's opinion reading:
"That decision appears to be in line with what
we might call a 'literal' construction of insurance
policies which appears to be the established rule
of the State of Washington" *when read out of
context*, could be read as a holding by this court

that the Washington Court will give even an ambiguously worded policy a 'literal' construction.

2. By assuming, contrary to the plain wording of Condition 3 of the policy, that it relates to nothing but mitigation of damages or by making a minimum amount of change in the wording so as to make it clumsy, awkward, repititious and ambiguous, the assured could avoid the consequences of his flagrant negligence and have a construction of such a policy as would permit him to recover for the loss of his airplane.

Appellants, in connection with their first argument, do not contend and cannot contend, in view of the many Washington cases, that the Washington Court does not hold steadfast to the rule announced in the cases of *Isaacson Iron Works v. Ocean Acc. Etc. Corp.*, 191 Wash. 221, 70 P.(2d) 1026 and *Hamilton Trucking Service v. Automobile Ins. Co.*, 39 Wn.(2d) 688, 237 P.(2d) 781, that it *will not permit* the rule requiring construction of insurance policies in favor of the assured to have the effect of *making a plain agreement* ambiguous and then interpret the policy in favor of the assured.

Some of the cases announcing and applying this rule are:

Green v. National Casualty Co., 87 Wash. 237, 151 Pac. 509;

Menger v. Inland Empire, Etc. Ins. Co., 118 Wash. 514, 203 Pac. 934;

Miller v. Penn Mutual Life Ins. Co., 189 Wash. 269, 64 P.(2d) 1050;

Maylon v. Ocean Acc. & Guar. Corp., 149 Wash. 70, 270 Pac. 96;

Handley v. Oakley, 10 Wn.(2d) 396, 116 P.(2d) 833;

Kane v. Order of United Com. Travelers, 3 Wn.(2d) 355, 100 P.(2d) 1036;

Associated Indemnity Corp. v. Waschsmith, 2 Wn.(2d) 679, 99 P.(2d) 420;

Evans v. Metropolitan Life Ins. Co., 26 Wn.(2d) 594, 174 P.(2d) 961.

Thus, in the last cited case, the court said:

“It is self-evident that (1) an insurance policy is merely a written contract between an insurer and an insured; (2) courts cannot rule out of the contract any language which the parties thereto have put into it; (3) a court is not at liberty to revise a contract under the theory of construing it; (4) neither abstract justice, nor any rule of construction, justifies the creation of a contract for the parties which they did not make themselves, or the imposition upon one party to a contract of an obligation not therein by him assumed. The words and terms as used in the contracts must be construed in their ordinary and popular sense.”

In *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P.(2d) 1050, the court said:

“Appellant vigorously contends that the insurance contract is ambiguous, but constitutes an entire and single contract, and as such should be construed most favorably in favor of the insured, citing *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 83 Pac. 113, 4 L.R.A. (N.S.) 636; *Algoe v. Pacific Mutual Life Ins. Co.*, 91 Wash. 324, 157 Pac. 993, L.R.A. 1917A, 1327; *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683,

294 Pac. 585; *Brown v. Northwestern Mutual Fire Association*, 176 Wash. 693, 30 P.(2d) 640; *Braley Motor Co. v. Northwest Casualty Co.*, 184 Wash. 47, 49 P.(2d) 911; Restatement of the Law of Contracts, Sec. 236; 32 C.J. 1152-1156, and 1303.

“The rule that the contract will be construed most favorably to the insured will be applied only when there is an unexplained ambiguity in the language of the contract. It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.*, 273 Fed. 55; 2 Cooley’s Briefs on Insurance (2d ed.) 999.

“The liability of respondent is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control. *Puget Sound Improvement Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190.

“In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Ins. Co.*, *supra*, but this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured. *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, and cases cited.”

In the sense that the Washington Court has uniformly refused to find ambiguity where the sense and meaning of the terms used in a policy are clear and unambiguous and has uniformly given such terms their *plain meaning*, that court does follow a rule of

“literal” construction. As the *Hamilton Trucking* case illustrates, the court has been unwilling to follow the decisions of other courts that specific policy language *is ambiguous*. We submit that it will be apparent to the ordinary reader of this court’s opinion that it was in this sense that it was said that the Washington court follows what *might be called* a “literal” rule of construction of insurance policies.

Appellants have not, in connection with their second argument, or at any time earlier in the case suggested how Condition 3 of the policy is in any way ambiguous or uncertain of meaning. They have at no time cited a single case construing or interpreting language similar to that used in Condition 3, either in the way they say it should be interpreted or which in any way touches upon the interpretation that should be given such language. If it be true, as asserted by Appellants on page 2 of their petition for rehearing, that Condition 3 is a condition of a kind commonly found in insurance policies, it is a *striking circumstance* that they are unable to cite any case interpreting such a condition as they say it should be interpreted or in some manner touching on the subject.

The plain fact is, as pointed out in the many cases cited in our brief (pp. 18 to 30) that the courts have uniformly held, as this court did in its opinion, that the language of the condition is not uncertain or ambiguous and prevents an assured from recovering for damages caused by his negligence.

This leads us to a more particular examination of Appellants’ arguments in their petition for rehearing.

Answer to Appellants' Argument that the Court Decided an Important Question of Local Law in a Way that Probably Is in Conflict with Applicable Local Decisions.

Under the heading "Scope and Basis of Decision" Appellants assert, at page 2 of their petition for rehearing, that this court construed Condition 3 out of context and then quote Section 1 of the policy only, and state that the court does not suggest or Appellees contend that this clause does not cover the loss sustained. *Out of context* the quoted Section 1 would cover the loss but as the court's opinion notes "*The Appellees' undertaking to insure was 'subject to the terms, conditions and limitations' contained and set forth in the policy or certificate.*" There are many exclusions and conditions placed upon the insurance by the policy which do not happen to be applicable to the particular facts of this case. Condition 3 is applicable, however, and defeats Appellants' right to recover for loss of the airplane in this case.

Appellants then review the contentions made in their brief but we will not here repeat the reply made to these contentions in our brief. Concerning Appellants noting that the policy covered damage to the airplane caused by frost it should perhaps be noted that the airplane obviously was not damaged in any way by frost, but rather was damaged by the assured's affirmative action.

At page 6 Appellants commence the argument on their contention that the Washington Supreme Court has expressly repudiated any rule of literal construction of insurance contracts in an *en banc* decision re-

versing a departmental decision. This argument is based entirely on the case of *Port Blakely Mill Co. v. Springfield, Etc. Ins. Co.*, 59 Wash. 501, 110 Pac. 36. Appellants allude to the fact that this was an *en banc* decision as though there were some magic in that circumstance. It is true that it was decided *en banc* by a six man court by a 5 to 1 decision and overruled a 4 to 1 decision by the department of the court but Appellants overlook the fact that the *Isaacson Iron Works* case was also decided *en banc* by a nine man court by an 8 to 1 decision, and that appellants in the *Hamilton Trucking* case, which was decided unanimously by a 5 man department of the court didn't even ask for a rehearing *en banc*.

However decided, the fact is that the problem presented in that case *did not involve* an inquiry by the court as to the *meaning* of the words used in the policy. The problem was whether the words used had the *legal effect* of making the clause involved a *warranty* in the strict legal sense of being a condition precedent to the attachment of the policy and a breach of which would *forever void* the policy instead of a *condition* which would merely suspend coverage during the time that the provision of the policy was being breached.

The court pointed out that it is fundamental that courts cannot make contracts for the parties and must enforce such contracts as are made and that contracts should not be construed so as to work a forfeiture of *either party's rights*. The case obviously does not have the signification attributed to it by appellants.

Appellants say that this case is noteworthy for an-

other reason in that it refers to the principle "expressio unius est exclusio alterius" since Condition 9 of the policy in suit expressly provides that a breach of it will avoid the policy.

The case itself refutes this contention of Appellants. The court quoted a clause in the policy reading as follows:

"In consideration of the reduced rate at which this policy is written it is expressly stipulated and made a condition of this contract that this Company shall be liable for no greater proportion of any loss than the amount hereby insured bears to 70% of the actual cash value of the property described herein at the time when said loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

The court then said:

"The term 'made a condition of this contract' is probably equivalent to a stipulation that the contract shall be void if the condition is violated."

An examination of the briefs shows that a similar contention to that of Appellants was made by counsel in the following cases, based upon the *Port Blakely Mill Co.* case and rejected by the Supreme Court of Washington.

Reynolds v. Pacific Marine Ins. Co., 98 Wash. 362, 167 Pac. 745;

Koontz v. General Casualty Co., 162 Wash. 77, 297 Pac. 1081;

Eakle v. Hayes, 185 Wash. 520, 5 P.(2d) 1072;

Johnson v. Inland Empire Ins. Co., 155 Wash. 6, 283 Pac. 177.

Obviously, the language of the policy in suit "subject to the terms, conditions and limitations contained herein or endorsed hereon, as hereinafter set forth" is equivalent to a stipulation that "the contract shall be void if the condition is violated" under the very case cited by Appellants as authority. This becomes even more apparent when it is noted that Condition 9 relates to things which would occur *after* and are not related to the cause of loss.

Appellants state that the *Port Blakely Mill Co.* case was cited with approval by the Washington court three years after its *Isaacson Iron Works* decision in *Kane v. Order of United Com. Travelers*, 3 Wn.(2d) 355, 100 P.(2d) 1036. This is the quotation in the latter case which concerned the legal effect of the word "warranted" in the former:

"In *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 28 L.R.A. (N.S.) 596, this court stated:

"The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to avail itself of such legal signification it must appear that the other contracting party also understood it'."

From pages 10 to 14, Appellants argue that the *Isaacson Iron Works* case is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the State of Washington.

Appellants' argument here, as elsewhere in their

petition for rehearing, is based upon the *fundamental misassumption* that the parties didn't intend the beginning language of Condition 3 to be *applicable* to the assured's operations or serve *any purpose whatsoever*. This language is as follows:

"The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * *."

Appellants labor mightily to distinguish the *Isaacson Iron Works* case but it is *not distinguishable*. Appellants say *without citing any authority whatsoever* that the *Isaacson Iron Works* case dealt with a provision that was so plain, simple and unambiguous as to not be capable of being construed while this case deals with one that is. The two provisions themselves give the most ready answer to this argument. For the convenience of the court they are again set forth.

"The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured. * * *

"The Assured agrees to use due diligence and exercise reasonable care to avoid doing damage to the property of others."

They say the question there was not whether the provision should be "literally" construed but whether it should be entirely eliminated. *Do not Appellants here seek to eliminate the provision?*

The two clauses are as alike as they could possibly be. Each requires the Assured to act affirmatively; so as to not negligently damage the property of others

in the *Isaacson* case, and the property insured in this case. Neither clause attempts to regulate all conduct of the assured as suggested by Appellants. The language employed in each is similar to language employed in other policies before other courts which gave them the same meaning as the court did in the *Isaacson* case (Br. 18 to 30).

Appellants, p. 13, state that "so far as the record shows" the language relied on to exclude coverage in the *Isaacson Iron Works* case was in a part of the policy where one would expect to find such a provision and not buried among a number of general conditions dealing with other matters as was done here.

We have inspected the record in the *Isaacson Iron Works* case and we invite Appellants and the court to do so. We have quoted the insuring clause and the condition there involved in our brief at pages 19-20, and the fact is that the policy there had an insuring clause substantially the same as the one here involved and it was a clause found in the *general conditions* part of the policy, just as here, that defeated the right of the assured to recover.

Appellants' argument concerning the placement of the word "and" amounts to nothing more than saying that by making a minimum amount of change in the wording of the policy they think it could be made to read like they would like to have it read. As we have heretofore pointed out, the suggested change would make the clause clumsy and awkward and, in effect, *say the same thing twice*.

The court's conclusion that it must follow the *Isaac-*

son Iron Works case as *the trial court did* is *eminently correct*. It cannot be distinguished.

Appellants next argue, pages 14 to 19, that the cases cited in the *Isaacson Iron Works* case and decided since that case show that there is no rule of literal construction of insurance contracts in Washington in the sense that ambiguous contracts, the meaning of which is uncertain, will be read literally instead of as intended by the parties.

The citation to the cases cited in the *Isaacson Iron Works* case was as follows:

“The burden rested upon respondent to show that the loss which it suffered comes within the terms of the policy; while, on the other hand, if the policy be ambiguous, such ambiguity should be construed in favor of the insured. *Maylon v. Ocean Accident & Guarantee Corp.*, 149 Wash. 70, 270 Pac. 96; *Ragley v. Northwestern Nat. Ins. Co.*, 151 Wash. 545, 276 Pac. 537; *Brown v. Northwestern Mutual Fire Assn.*, 176 Wash. 693, 30 P.(2d) 640.”

The *holding* of the *Isaacson Iron Works* case was that the court would not, despite the quoted rule, create an ambiguity where none existed and then construe the policy in favor of the insured.

The fact that the Washington court will resort to construction to find the intention of the parties when the meaning of the words they have used in their contract is uncertain, *does not mean* that the court does not follow what *might be called* “a ‘literal’ rule of construction of insurance policies.” In reading policies

that are not ambiguous or uncertain of meaning, *literally*, and in being slow to find ambiguity even though by so doing they might help out some assured at the expense of an insurance company, it may be said that they do follow such a rule.

We cannot escape the feeling that what Appellants have done is to separate one sentence from the context of the court's opinion, set up a meaning for it that was not intended for it by the court and which the ordinary reader would not get from it and then proceed to knock over the bogey man represented in their wrong impression and which exists only in their own minds.

Appellants have cited no case which is *in any way inconsistent* with the holding of this court or the cited cases from the Washington Court or which in *any way subtracts* from the holding of this or the cited cases.

The first case cited by Appellants is *Maylon v. Ocean Accident & Guaranty Corp.*, 149 Wash. 70, 270 Pac. 96. The court there affirms the rule of the *Isaacson* case, as follows:

“Appellant cites many authorities; but, by reason of the difference of the wording of the policies, we think none is in point here beyond the general holding—which we do not dispute—that, when the terms of a policy are clear and unambiguous they must be given force and effect.”

The next case cited is *Ragley v. Southwestern Nat. Ins. Co.*, 151 Wash. 545, 276 Pac. 537. This was a suit on a fire policy on a house providing insurance “while occupied only for dwelling house purposes.” The court pointed out that the quoted clause was not capable

of any very exact meaning in view of the great variety of uses that may be made of a dwelling house and approved an instruction given to the jury concerning the provision on the basis of substantial evidence submitted that the house was used for "dwelling house purposes."

The next case cited is *Brown v. Northwestern Mutual Fire Assn.*, 176 Wash. 693, 30 P.(2d) 640, and the court merely held that no change had taken place "in the interest, title or possession of the subject of insurance" under a policy which insured the mortgagor, conditional vendor and conditional vendee of property where the conditional vendee had defaulted and the conditional vendor had commenced an action to declare his interest in the property forfeited.

The next case cited is *Kane v. Order of United Com. Travelers*, 3 Wn.(2d) 355, 100 P.(2d) 1036. Appellants quote from this case to the effect that where a policy is *fairly* susceptible of two constructions, a meaning favorable to the assured will be implied, but neglects to quote what immediately followed their quotation in the opinion which affirms the rule of the *Issacson Iron Works* case as follows:

"On the other hand, that rule is applied only where there is an unexplained ambiguity in the contract. *Miller v. Penn Mutual Ins. Co.*, 189 Wash. 269, 64 P.(2d) 1052."

The next case cited by Appellants is *Jack v. Standard Marine Ins. Co.*, 33 Wn.(2d) 265, 205 P.(2d) 251. The question in that case was whether there had been an "upset or overturning" of the *crane and clamshell bucket* rather than the *tractor* to which they were at-

tached as intimated by Appellants, and the court held that there had been, when the crane was elevated beyond its center of gravity, lost its equilibrium and fell over backwards.

The next case cited by Appellants is *Handley v. Oakley*, 10 Wn.(2d) 396, 116 P.(2d) 833. The rule of the *Isaacson Iron Works* case was there affirmed as follows:

“Appellant finally contends that a policy of insurance must be strictly construed against the insurance company, and liberally in favor of one to be afforded protection by it. In discussing this rule in *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, we stated:

“ ‘In thus construing the policy, we are not unmindful of the rule that policies of insurance are construed in favor of the insured and most strongly against the insurance companies. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L.R.A. (N.S.) 636. But this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of the insured. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain and ordinary meaning.’

“In the instant case, we do not find the provisions of the policy ambiguous or difficult of comprehension and therefore there is no necessity for the application of the rule.”

The next case cited by Appellants is *Doke v. United Pac. Ins. Co.*, 15 Wn.(2d) 536, 131 P.(2d) 436. This

was a suit on an accident policy covering a national guardsman against accidental injury "caused by service classified as incurred in the line of duty." The policy didn't define this language and the court had to ascertain what the parties meant thereby.

Appellants next argue, pages 19 to 21, that the case of *Hamilton Trucking Service, Inc. v. Automobile Ins. Co.*, 39 Wn.(2d) 688, 237 P.(2d) 781, has no controlling effect in this case and does not indicate in any way that there is a "literal" rule of construction of insurance policies in the State of Washington.

Appellants state that this court, in summarizing that decision, did not refer to the "most significant provision in the insurance policy actually before the court that governed the holding which it announced." This was undoubtedly for the reason that this court read that decision correctly instead of as Appellants read it. It is true that the assured there contended he had insurance under two clauses of the policy—one providing insurance of the load upon colliding with an object due to overwidth or overheight of the load and the other providing insurance against "accidental collision of the motor truck or trailer with any other automobile, vehicle or object." The court disposed of the first contention summarily on the ground that the evidence undisputably showed the load was not overheight and the rest of the opinion, which constituted most of what the court said, was devoted to the question of whether the loss came within the other clause providing insurance against "accidental collision of

the motor truck or trailer with any other automobile, vehicle or object.”

Appellants attempt to distinguish the *Hamilton Trucking* case by stating “the policy in that case presented no question as to the construction of a condition relied on to take away the coverage given by the insuring clause as is the case here.” The fact is that the beginning broad language of the policy in the *Hamilton Trucking* case was cut down by a later provision in the policy specifying the perils insured. The beginning broad language indicated it would be cut down. So, in the case at bar, the beginning sentence of the policy specifies that the insurance is subject to “the terms, conditions and limitations” found later in policy. Both the broad language relied upon by Appellants and the limiting clauses of the policy are found later therein.

Appellants state that the Washington court’s refusal to find ambiguity in the policy in the *Hamilton Trucking* case which seven other courts had found ambiguous must have influenced this court in inferring that the Washington court follows what might be called a “literal” rule of construction. Appellants make it clear that they *do not quarrel* with the holding in that case.

We submit that this court *should be influenced* by that decision in finding that the Washington court follows what *might* be called a “literal” rule of construction in the sense that it *steadfastly refuses to be stampeded into finding* ambiguity where *none exists*, despite the views of other courts, in order to aid some assured at the expense of some insurance company.

Argument in Answer to Appellants' Argument on Grounds 2 and 3 for Rehearing.

From pages 22 to 26 Appellants' present argument on their second ground for rehearing. Appellants assert that the court's treatment of Condition 3 is inconsistent with its treatment of Conditions 1 and 2. Our first impression on reading the court's opinion, from which we have not receded, was that the court had been *painfully* consistent.

Appellants' argument on this ground is largely a rehash of their former arguments, which we believe have been adequately answered. However, at page 24, Appellants' assert:

"To reach the result contended for by Appellees and defeat recovery on the policy for breach of Condition 3, it is necessary to accept the broad, sweeping proposition which Appellees advance, that 'A breach of a Condition Material to the Risk Voids a Policy of Insurance' (Br. of Appellees, pp. 33 to 37). What Appellees really contend is that the same consequence would follow from breach of Condition 3 as would result from a breach of warranty.

"The decision of this court would probably be construed as an implicit approval of that proposition. If so, the decision would constitute a most regrettable innovation in insurance law."

What Appellants have done is to quote the heading of our argument (Br. 33) rather than the argument (Br. 33-36). It is clear that our position is that where a breach of a condition is material to the risk *and a breach thereof exists at the time of the loss*, recovery may not be had on the policy. The authorities cited by

us were in support of the position taken in our argument rather than to the heading thereof. Appellants *have not at any time* cited any authority in support of *any different* theory of the law.

Appellants make no new argument on Ground 3 of their petition for rehearing and we, therefore, rest on our brief.

CONCLUSION

In conclusion, we respectfully submit that Appellants are merely shadow boxing with the portion of the court's opinion which is unfavorable to them in their argument on their petition for rehearing. Their argument, when fully analyzed, ends up by conceding that the cases from the Washington Supreme Court relied upon by this court in its opinion *accurately reflect the law of Washington*. In view of the many cases from that court, cited herein, they could not do otherwise. Rather than attempt to show that the cases relied upon do not accurately reflect the law, Appellants content themselves with attempting to refute some supposed rule of law which they assert the court pronounced and which they glean from one sentence of the court's opinion separated from its context.

We submit that the court's opinion is eminently correct and accurately portrays and applies the law of Washington to the facts of this case.

Respectfully submitted,

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

No. 13126

**United States
Court of Appeals**
for the Ninth Circuit.

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the
Estate of Joseph E. Allen, Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

NOV 30 1951



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 52057-HW

In the Matter of:
JOSEPH E. ALLEN,

Bankrupt.

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER IN RE TITLE
TO A CERTAIN DRUG STORE BUSINESS

To the Honorable Harry C. Westover, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

Christine Allen has duly filed herein her petition for the review of an order made by your Referee in this matter on July 10, 1951, in which he decreed that a certain drug store business known as Jerry's Drugstore, in Lone Pine, California, was an asset of the above-entitled estate and that the said Christine Allen had no interest therein. [4*]

The Proceedings

The bankrupt herein and the said Christine Allen were formerly husband and wife, their marriage having been terminated by a final decree of divorce

*Page numbering appearing at foot of page of original Certified Transcript of Record.

on June 26, 1950. On June 8, 1949, they entered into a property settlement agreement in which, among other things, they agreed that the aforesaid drug store business which they owned should be continued to be owned by them as community property, but that if either of them obtained an interlocutory decree of divorce that they then should own the said business as tenants in common, each owning an undivided one-half interest. The wife, Christine Allen, obtained an interlocutory decree of divorce on June 9, 1949.

The aforesaid drug store business had always been operated by the bankrupt and it was provided in the aforesaid property settlement agreement that it should remain under his active management and control. The bankrupt continued the operation of the business until February 26, 1951, when he ceased operations. However, he retained possession of the assets of the business until they were turned over to a receiver in this bankruptcy case.

The wife, Christine Allen, commenced an action against the bankrupt for damages or alimony. The bankrupt filed an answer and a cross-complaint in said action, praying that the aforesaid drug store business be sold and the proceeds be divided. No trial has been had in the said action.

Later the bankrupt filed a petition in this Court under section 5b of the Bankruptcy Act, in which he alleged that a partnership existed between himself and Christine Allen in the operation of the said business, and in which he prayed that such partnership be adjudged a bankrupt. Christine Allen re-

sisted the said petition upon the ground that she [5] was not a partner. Her position was sustained and the said petition was dismissed.

Thereafter, the bankrupt commenced this pending bankruptcy proceeding in which he alone is the bankrupt. Ralph Meyer was appointed Receiver in the case and he is now the trustee in bankruptcy in the matter. In the aforesaid partnership proceeding it has been made clear that Christine Allen claimed that she was the owner of an undivided one-half interest in and to all of the assets of the aforesaid business and that her said interest in the said assets was free and clear of the claims of creditors who had extended credit to the business.

In view of the claims so made by Christine Allen, the receiver in this case realized that no sale of the assets of the said business could safely be made in this bankruptcy proceeding until a determination was made as to the extent and character of the interest of this estate in such assets. Accordingly, the receiver commenced proceedings in this Court to test the validity and the enforceability of the claims made, as aforesaid, by Christine Allen. A number of pleadings were filed and several hearings were had, and at the conclusion of the matter your Referee held: (1) That title to the assets of the said business should be quieted in the trustee in this case; (2) That the interest which Christine Allen acquired under the aforesaid property settlement agreement was an interest in the net worth of said business and not an interest in the assets thereof; and (3) that the transfer of the said in-

terest to Christine Allen is void as against the creditors and the trustee herein under section 3440 of California's Civil Code, for the reason that it was not accompanied by an immediate delivery by the bankrupt [6] to Christine Allen of the assets of the said business, and was not followed by an actual and continued change of possession of such assets. On July 10, 1951, your Referee filed his findings of fact and conclusions of law and his order in the premises, and it is from the said order that this review is taken.

The Questions Presented

The questions presented by this review are the following:

1. Was your Referee correct in holding that the interest acquired by Christine Allen under the property settlement agreement here involved was an interest in the net worth of the business here in question and not an interest in the assets thereof?

2. Was your Referee correct in holding that the transfer of the said interest to Christine Allen is void as against the creditors and the trustee herein upon the ground that it was not accompanied by the change of possession of the assets of the afore-said business which was required by section 3440 of California's Civil Code?

The Evidence

It is unnecessary to transmit any of the evidence in this case other than the exhibits which are going

up with this certificate. The facts are not in dispute, and the position taken by the petitioner on review rests entirely upon the provisions of the property settlement agreement, a photostat of which is in evidence as respondent's Exhibit No. 1 in the case. [7]

Referee's Findings of Fact, Conclusions
Of Law, and Order

The originals of your Referee's Findings of Fact and Conclusions of Law and of his Order in this matter are going up with this certificate.

Papers Submitted

The following papers are herewith transmitted:

1. Proceedings to Determine Title and Order to Show Cause, filed May 24, 1951.
2. Order to Show Cause, filed May 24, 1951.
3. Answer to Receiver's Petition for Turnover, filed June 7, 1951.
4. Amended Answer to Receiver's Petition for Turnover, filed June 11, 1951.
5. Petition to Determine Title to Personal Property & Order to Show Cause, filed June 12, 1951.
6. Order to Show Cause, filed June 12, 1951.
7. Petition for Restraining Order and Order to Show Cause, filed June 12, 1951.
8. Order to Show Cause, filed June 12, 1951.

9. Answer to Trustee's Petition for Restraining Order and Order to Show Cause, filed June 15, 1951.

10. Answer to Receiver's Petition to Determine Title to Personal Property and Order to Show Cause, filed June 15, 1951.

11. Findings of Fact and Conclusions of Law, filed July 10, 1951.

12. Order, filed July 10, 1951.

13. Petition for Review of Referee's Order Quieting Title, filed July 18, 1951. [8]

14. Respondent's Exhibits 1, 2, 3 and 4.

Respectfully submitted this 20th day of July, 1951.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed July 20, 1951., U.S.D.C. [9]

[Title of District Court and Cause.]

PROCEEDINGS TO DETERMINE TITLE AND
ORDER TO SHOW CAUSE

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, Ralph Meyer, and respectfully represents, as follows:

I.

That he is the duly appointed, qualified and acting Receiver in Bankruptcy herein.

II.

That heretofore and prior to the filing of the proceedings herein, Joseph E. Allen was divorced from Christine Allen in the Superior Court of the State of California, which divorce was on or about June, 1949. Prior to the granting of said divorce, the parties executed a Property Settlement Agreement whereby it was agreed that upon entry of an interlocutory decree of divorce, the parties theretofore owning as community property would thence own the drugstore business as tenants in common, with full management and control in the above bankrupt; that said Property Settlement Agreement was recorded on or about December, 1950; that your petitioner is informed and believes and, [10] therefore, alleges that, no notice of intention to transfer, hypothecate, sell or assign any portion of said business was filed by either of the parties prior to the execution of said Property Settlement Agreement, or prior to the granting of said interlocutory decree of divorce.

III.

That there was a creditor in existence of the above-named bankrupt on the 28th day of February, 1949, which said creditor remains unpaid and was unpaid as of the date of the filing of the proceedings herein; that said creditor is Lester A. Johnson; that the debt owed by bankrupt and Christine Allen

to said Johnson is the sum of \$3600.00, payable on demand, together with interest at 5% per annum from February 28, 1949; that said indebtedness is evidenced by a promissory note executed by the above-named bankrupt and Christine Allen.

IV.

That your petitioner alleges that the above-named bankrupt and Christine Allen failed to comply with the necessary requests of the Civil Code of the State of California, Section 3440 thereof, and that as a result said purported transfer is void as to creditors.

V.

That said Christine Allen contends that she is the owner of and entitled to possession of one-half of all of the assets of the aforesaid business known as Jerry's Drugstore, located at 206 North Main Street, Lone Pine, California, and is entitled to take said assets free and clear of any and all creditors claims; that your petitioner contends that said purported transfer by virtue of the aforesaid Property Settlement Agreement is void as to creditors by reason of the failure to comply with the appropriate laws of the State of California relating to transfer of personal property, and that title to said property should be quieted in [11] your petitioner.

Wherefore, your petitioner prays that an Order be made and entered herein, quieting title in and to all of the personal property located at 206 North Main Street, Lone Pine, California, and belonging

to or used in connection with that business known as Jerry's Drugstore; that an Order to Show Cause be issued directing Christine Allen to appear before this Honorable Court and show cause, if any she has, why title to said personal property should not be quieted in your petitioner.

Dated this 24th day of May, 1951.

/s/ RALPH MEYER,
Receiver in Bankruptcy.

/s/ DOROTHY KENDALL,
Attorney for Receiver.

Duly verified.

[Endorsed]: Filed May 24, 1951, Referee. [12]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition of Ralph Meyer, Receiver in Bankruptcy herein, and good cause appearing therefor:

It Is Hereby Ordered that, Christine Allen appear and show cause, if any she has, before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, on the 11th day of June, 1951, at the hour of 2:00 o'clock p.m., why title to the personal property of the above estate should not be quieted in Receiver herein.

It Is Further Ordered that service of this Order

to Show Cause, together with a copy of the petition upon which the same is issued, may be made by serving the respondent by mail, postage prepaid; that not less than five days prior to the hearing of this Order to Show Cause shall be sufficient service.

It Is Further Ordered that, if respondent desires to contest the petition upon which this Order to Show Cause is issued, she should file an Answer setting forth the grounds thereof two days prior to the hearing thereon.

Dated this 24th day of May, 1951.

/s/ BENNO M. BRINK.

[Endorsed]: Filed May 24, 1951, Referee. [14]

[Title of District Court and Cause.]

AMENDED ANSWER TO RECEIVER'S
PETITION FOR TURNOVER

(Christine Allen)

To Benno M. Brink, Esq., Referee in Bankruptcy:

Christine Allen answers the petition of Ralph Meyer verified May 24, 1951, praying for a turnover of property as follows:

I.

Answering the allegations contained in paragraph II thereof, Respondent admits that an interlocutory decree of divorce was duly made and entered on or about the month of June of 1949 by the Superior Court of the State of California, in and for the County of Inyo, and that by the terms thereof it

was ordered, adjudged and decreed that your Respondent was entitled to a final decree of divorce from the said bankrupt when one year shall have elapsed from the entry of said decree; admit that prior to the making and entering of aforesaid interlocutory decree of divorce your Respondent and said bankrupt made, executed and delivered a property settlement agreement dated June 8, 1949; [21] admit that by the terms of said property settlement agreement it was agreed by and between your Respondent and said bankrupt that they then owned that certain drug business located in the Town of Lone Pine, County of Inyo, State of California, as community property, and further that in the event an interlocutory decree of divorce was obtained by either of the parties hereto then said parties should thereafter own said business as tenants in common, each owning an undivided one-half interest, and allege in this connection that by the terms of the aforesaid interlocutory decree of divorce said property settlement agreement was approved and confirmed by the court and each of the parties thereto was ordered by said Court to perform the same; admit that said property settlement agreement was recorded in the Office of the County Recorder on or about December, 1949; admit that no notice of intention to transfer, hypothecate, sell or assign any interest in said business was filed by either your Respondent or said bankrupt prior to the execution of said property settlement agreement or prior to the granting of said interlocutory decree of divorce and in this

connection allege that the same was not necessary or required by law; except as expressly hereinabove admitted Respondent denies each and every allegation therein contained and the whole thereof.

II.

Answering the allegations contained in paragraph III denies that said promissory note was payable on demand and alleges in this connection that said promissory note was due and payable on the 28th day of February, 1951.

III.

Denies each and every allegation contained in paragraph IV of said petition.

IV.

Answering the allegations contained in paragraph V [22] thereof, admits that your Respondent claims that she is the owner of and entitled to the possession as a tenant in common of one-half of all of the assets of the business known as Jerry's Drugstore located in the Town of Lone Pine, California, and that her title and right thereto is free and clear of any claims of any persons whatsoever; denies each and every allegation contained in said paragraph not expressly herein admitted.

As a First, Separate and Affirmative Defense Your Respondent Alleges:

I.

That there is a non-joinder of necessary parties herein in that the trustee for the bankrupt estate is not made a party hereto.

As a Second, Separate and Affirmative Defense
Your Respondent Alleges:

I.

That she is the owner as a tenant in common with said bankrupt, Joseph E. Allen, of the drug business known as Jerry's Drugstore situated in the Town of Lone Pine, County of Inyo, State of California; that she has claimed and now claims the ownership of said interest openly, notoriously, and adversely since the entry of the aforesaid interlocutory decree of divorce; that since the entry of the aforesaid interlocutory decree of divorce, in the month of June, 1949, she has claimed, and now claims, the ownership as a tenant in common of an interest in said drug business, which claim has been, and is now, made openly, notoriously and adversely to said bankrupt, his trustee in bankruptcy, the receiver of the bankrupt estate and the entire world; that this court has no jurisdiction over the subject matter of said petition, the title of your Respondent to said property [23] or the rights or claims to or in said property of your Respondent.

As a Third, Further and Affirmative Defense, Your
Respondent Alleges:

I.

That there is now pending an action in the Superior Court of the State of California in and for the County of Inyo entitled "Christine Allen, Plaintiff and Cross-Defendant, vs. Joseph E. Allen,

Defendant and Cross-Complainant," being action No. 5025 of the proceedings of said Court, that there have been filed in said action by your Respondent a complaint and answer to a cross-complaint and by said defendant, the bankrupt herein, an answer and a cross-complaint; that said action was commenced about the month of January, 1951, by your Respondent by the filing of said complaint in said Court and the issuance by said Court of summons thereon; that the said pleadings in said cause in part pray for a partition of said drug business known as Jerry's Drugstore situated in the Town of Lone Pine, County of Inyo, State of California; that said cause is now set for trial in said Court for the 10th day of July, 1951, at the hour of 10:00 o'clock a.m. of said day; that by reason thereof another action is pending involving the same issues as are purportedly raised in the petition on file herein.

Wherefore Christine Allen prays that said petition be denied without costs.

/s/ CHRISTINE ALLEN,
Respondent.

JESS G. SUTLIFF, and
HARRY R. ROBERTS,

By /s/ HARRY R. ROBERTS,
Attorneys for espondent.

Duly verified.

[Endorsed]: Filed June 11, 1951, Referee. [24]

[Title of District Court and Cause.]

PETITION TO DETERMINE TITLE TO PERSONAL PROPERTY & ORDER TO SHOW CAUSE

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Comes now your petitioner, Ralph Meyer, and respectfully represents, as follows:

I.

That he is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

II.

That heretofore and prior to the filing of the proceedings herein, Joseph E. Allen was divorced from Christine Allen in the Superior Court of the State of California on or about June, 1949. Prior to the granting of said divorce, the parties executed a Property Settlement Agreement whereby it was agreed that upon entry of an interlocutory decree of divorce, the parties theretofore owning as community property would thence own the drugstore business as tenants in common, with full management and control in the above bankrupt; that said Property Settlement Agreement was recorded on or about December, 1950; that your petitioner is informed [26] and believes and, therefore, alleges that, no notice of intention to transfer, hypothecate, sell or assign any portion of said business was filed by either of the parties prior to the execution of

said Property Settlement Agreement, or prior to the granting of said interlocutory decree of divorce.

III.

That said Christine Allen contends that she is the owner of and entitled to possession of one-half of all of the assets of the aforesaid business known as Jerry's Drugstore, located at 206 North Main Street, Lone Pine, California, and is entitled to take said assets free and clear of any and all creditors' claims.

IV.

That your petitioner alleges Christine Allen has no right, title nor interest in or to the following:

1. That certain building known as 206 North Main Street, Lone Pine, California, which building was purchased by the bankrupt herein with funds acquired by him subsequent to the divorce of the parties hereto; that said building is by the terms of the lease executed by and between the bankrupt, as Lessee, and the Department of Water and Power of the City of Los Angeles, as Lessor, removable upon the termination of the lease.

2. The Alcoholic Beverage License issued for the said premises, together with all of the stock in trade of alcoholic beverages for the reason that said license is issued solely to the bankrupt herein; that no secret interests or partnerships are permitted by the California Alcoholic Beverage Control Act; that all persons having an interest in such a license

must be named as licensees; that no person other than a licensee may hold or sell any alcoholic beverages; that no application to transfer said license from the bankrupt alone to the bankrupt and respondent herein jointly was ever filed with the California State Board of Equalization. [27]

V.

That by the terms of the Property Settlement Agreement executed between the bankrupt and said Christine Allen as hereinabove mentioned, respondent Christine Allen expressly designated and appointed the bankrupt herein as her agent for the purpose of managing, operating and controlling the said drugstore business; that in pursuance of said agency, that bankrupt herein operated said drugstore up to and including February 26, 1951, incurring in connection therewith obligations to creditors, all as set forth on the Schedules of the said bankrupt.

That by the creation of said agency, your petitioner alleges Christine Allen is estopped to assert any interest in or to any of the assets of said drugstore business in violation of and adverse to the rights of creditors.

That if it is adjudicated by this Honorable Court that Christine Allen has any interest in or to any of the assets of said drugstore business that the same be deemed subordinate and subject to the claims of all of said creditors, and that your petitioner may be ordered to sell all of said assets free and clear of any and all claims of said Christine Allen.

Wherefore, your petitioner prays that a hearing be had and that an Order be made and entered herein, determining and adjudicating the rights of said Christine Allen in and to the assets of Jerry's Drugstore located at 206 North Main Street, Lone Pine, California; that said Christine Allen be ordered to appear and assert her claims and that if it is found any right or title or interest to said estate's assets be in Christine Allen, that the same be declared subordinate to the rights of the creditors whose valid claims are filed in this proceeding.

Dated this 12th day of June, 1951.

/s/ RALPH MEYER,

Trustee in Bankruptcy.

/s/ DOROTHY KENDALL,

Attorney for Trustee.

Duly verified.

[Endorsed: Filed June 12, 1951, Referee. [28]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition of Ralph Meyer, Trustee in Bankruptcy herein, and good cause appearing therefor:

It Is Hereby Ordered that, Christine Allen appear and show cause, if any she has, before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Temple and Spring

Streets, Los Angeles, California, on the 19th day of June, 1951, at the hour of 2:00 o'clock p.m., why title to the personal property of the above estate should not be quieted in Trustee herein.

It Is Further Ordered that, service of this Order to Show Cause, together with a copy of the Petition upon which the same is issued, may be made by serving the same by mail or personal delivery to the office of respondent's attorney, Harry Roberts, 1120 Banks-Huntley Building, Los Angeles, California; that not less than five days prior to the hearing of this Order to Show Cause shall be sufficient service.

It Is Further Ordered that, if respondent desires to contest the petition upon which this Order to Show Cause is issued, [30] she should file an Answer setting forth the grounds thereof two days prior to the hearing thereon.

Dated this 12th day of June, 1951.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed June 12, 1951, Referee. [31]

[Title of District Court and Cause.]

PETITION FOR RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, Ralph Meyer, and
respectfully represents, as follows:

I.

That he is the duly appointed, qualified and acting
Trustee in Bankruptcy herein.

II.

That heretofore and prior to the commencement
of these proceedings herein, Christine W. Allen
filed an action in the Superior Court of the County
of Inyo, No. 5025, entitled Christine W. Allen vs.
Joseph E. Allen, for damages wherein the bankrupt
herein, by his attorney, answered and filed a cross-
complaint for partition of that certain drugstore
known as Jerry's Drugstore, 206 North Main
Street, Lone Pine, California.

III.

That the issues to be litigated in said action are
before this Honorable Court, who is and has been
hearing said issues. That if the said State action
is prosecuted by plaintiff, Christine [32] Allen, it
would be a duplication of litigation in that this
Court has already assumed jurisdiction; that there
would be unnecessary expense to the estate herein

in defending and going forward with said suit; that no purpose would be served by the continuance of the State law suit.

That title to the assets of said drugstore as between said Christine Allen and the bankrupt herein will be decided by this Honorable Court; that as to the action for damages against the bankrupt by said Christine Allen, if she has a claim against said bankrupt, it must be filed before this Court.

IV.

That the plaintiff herein, Christine Allen, has announced her intention of continuing the prosecution of said law suit; that the same has been set for trial on July 10, 1951.

Wherefore, your petitioner prays that an Order be made and entered herein, restraining said respondent from continuing said law suit.

Dated this 12th day of June, 1951.

/s/ RALPH MEYER,
Trustee in Bankruptcy.

/s/ DOROTHY KENDALL,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed June 12, 1951, Referee. [33]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the verified petition of Ralph Meyer, Trustee in Bankruptcy herein, and good cause appearing therefor;

It Is Hereby Ordered that, Christine Allen appear and show cause, if any she has, before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, on the 19th day of June, 1951, at the hour of 2:00 o'clock p.m., why she should not be restrained from continuing that certain law suit filed in the Superior Court of Inyo County.

It Is Further Ordered that service of this Order to Show Cause, together with a copy of the Petition upon which the same is issued, may be made by serving the same by mail or personal delivery to the office of respondent's attorney, Harry Roberts, 1120 Banks-Huntley Building, Los Angeles, California; that not less than five days prior to the hearing of this Order to Show Cause shall be sufficient service.

It Is Further Ordered that, if respondent desires to contest the petition upon which this Order to Show Cause is issued, [35] she should file an Answer setting forth the grounds thereof two days prior to the hearing thereon.

Dated this 12th day of June, 1951.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed June 12, 1951, Referee. [36]

[Title of District Court and Cause.]

ANSWER TO TRUSTEE'S PETITION FOR
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE

(Christine Allen)

To Benno M. Brink, Referee in Bankruptcy:

Christine Allen answers the petition of Ralph Meyer, Trustee in Bankruptcy herein, verified June 12, 1951, praying for a restraining order as follows:

I.

Answering the allegations contained in paragraph III thereof Respondent denies generally and specifically each and every allegation therein contained.

Wherefore your Respondent prays that said petition be denied and for her costs herein.

/s/ CHRISTINE ALLEN,
Christine Allen, Respondent.

JESS G. SUTLIFF, and

HARRY R. ROBERTS,

By /s/ HARRY R. ROBERTS,
Attorneys for Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1951, Referee. [37]

[Title of District Court and Cause.]

ANSWER TO RECEIVER'S PETITION TO
DETERMINE TITLE TO PERSONAL
PROPERTY AND ORDER TO SHOW
CAUSE

(Christine Allen)

To Benno M. Brink, Referee in Bankruptcy:

Christine Allen answers the petition of Ralph Meyer, Trustee in Bankruptcy herein, verified June 12, 1951, praying for a determination of title to personal property as follows:

I.

Answering the allegations contained in paragraph II thereof Respondent admits that an interlocutory decree of divorce was duly made and entered on or about the 8th day of June, 1949, by the Superior Court of the State of California, in and for the County of Inyo, and that by the terms thereof, it was ordered, adjudged and decreed that your Respondent was entitled to a final decree of divorce from said bankrupt when one year shall have elapsed from the entry of said decree; admits that prior to the making and entry of the aforesaid decree your Respondent and said bankrupt made, executed and delivered a property settlement agreement [40] dated June 8, 1949; admits that by the terms of said property settlement agreement it was agreed by and between your Respondent and said bankrupt that they then owned that certain drug business located in the Town of Lone Pine, County

of Inyo, State of California, as community property, and, further, that in the event an interlocutory decree of divorce was obtained by either of the parties thereto by said parties should thereafter own said business as tenants in common, each owning an undivided one-half interest and further by the terms thereof your Respondent was to receive the first \$15,000.00 from the proceeds of any sale of said drug store and alleges in this connection that by the terms of the aforesaid interlocutory decree of divorce said property settlement agreement was approved and confirmed by said Court and each of the parties thereto was ordered to perform the same; admits that said property settlement agreement was recorded in the County Recorder's office in said County on or about December, 1949; admits that no notice of intention to transfer, hypothecate, sell or assign any interest in said business was filed by either your Respondent or by said bankrupt, prior to the execution of said property settlement agreement or prior to the granting of said interlocutory decree and in this connection alleges that the same was not necessary nor required by law; except as expressly hereinabove admitted, Respondent denies each and every allegation therein contained and the whole thereof.

II.

Answering the allegations contained in paragraph III thereof Respondent admits that she claims that she is the owner of an undivided one-half interest as a tenant in common with said

bankrupt in and to the entire stock in trade, furniture and fixtures and other personal property located in the drug business known as Jerry's Drugstore situated in the Town of Lone Pine, County of Inyo, State of California, together with all of the [41] accounts receivable and good will thereto belonging, and that her ownership thereof is free and clear of any and all creditors' claims; except as expressly herein admitted Respondent denies each and every allegation therein contained.

III.

Answering the allegations contained in paragraph IV thereof, admits that your Respondent has no right, title or interest in and to that certain building known as 206 North Main Street in the Town of Lone Pine, State of California, and alleges that she has never claimed an interest therein and hereby disclaims any and all right, title and interest therein. Further answering the allegations contained in said paragraph alleges that at the time of the execution of the aforesaid property settlement agreement and at the time of the interlocutory decree your Respondent and said bankrupt were the owners as husband and wife as community property of that certain Alcoholic Beverage license issued by the State Board of Equalization of the State of California, together with stock in trade of alcoholic beverages, which license was issued to and standing in the name of said bankrupt; admits that no application has ever been filed with the State Board of Equalization of the State of Cali-

for the transfer of said license from said bankrupt to your Respondent and said bankrupt jointly, and alleges in this connection that no such application was required or necessary; except as expressly herein admitted denies generally and specifically each and every allegation therein contained.

IV.

Answering the allegations contained in paragraph V thereof admits that said bankrupt operated said drug store up to and including February 26, 1951, and alleges in this connection that said bankrupt did, on or about said date, abandon said drug store and ceased thereafter to operate, occupy or possess the same; [42] except as expressly hereinabove admitted, denies generally and specifically each and every allegation therein contained and the whole thereof and alleges that your Respondent is the owner of an undivided one-half interest in and to all of the entire stock in trade, furniture and fixtures and other personal property located in the drug business known as Jerry's Drugstore situated in the Town of Lone Pine, County of Inyo, State of California, together with all of the accounts receivable and good will thereto belonging, free and clear of any and all claims of creditors of said bankrupt.

As a First, Further and Affirmative Defense Your Respondent Alleges:

I.

That she is the owner of an undivided one-half

interest as a tenant in common with said bankrupt of all of the stock in trade, furniture and fixtures and other personal property located in the drug business known as Jerry's Drugstore situated in the Town of Lone Pine, County of Inyo, State of California, together with all of the accounts receivable and good will thereto belonging; that she has claimed and now claims the ownership of said interest openly, notoriously and adversely to said bankrupt and the entire world since the entry of the aforesaid interlocutory decree of divorce; that said bankrupt at the time of the filing of his petition herein was not and had not been since the 26th day of February, 1951, in possession or control of any of the aforesaid assets; that this court has no jurisdiction over the subject matter of said petition, the title of your Respondent to the aforesaid assets or over her rights and claims thereto.

Wherefore your Respondent prays that said petition be denied and for her costs herein.

/s/ CHRISTINE ALLEN,
Respondent.

JESS G. SUTLIFF, and
HARRY R. ROBERTS,

By /s/ HARRY R. ROBERTS,
Attorneys for Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 15, 1951, Referee. [43]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: (1) DETERMINATION OF
TITLE TO PERSONALTY; (2) RESTRAIN-
ING STATE COURT LITIGATION

The petition of Ralph Meyer, Trustee in Bankruptcy filed herein on the 24th day of May, 1951, came on regularly for hearing before the Honorable Benno M. Brink, Trustee in Bankruptcy on the 11th day of June, 1951, the Trustee in Bankruptcy appearing through his counsel, Dorothy Kendall; the Respondent Christine W. Allen having answered said petition and having appeared through her counsel, Jess G. Sutliff and Harry R. Roberts and evidence having been introduced and the court made its order dismissing said petition without prejudice to further proceedings to determine the title of Respondent to the property belonging to the bankrupt estate, the petition of Ralph Meyer, Trustee in Bankruptcy filed herein on the 12th day of June, 1951, to determine title to personal property and said Christine W. Allen having filed an answer thereto, said petition came on regularly for hearing on the 19th day of June, 1951, before the Honorable Benno M. Brink, Referee in Bankruptcy, said Trustee appearing through his counsel Dorothy [46] Kendall and the Respondent Christine W. Allen appearing through her counsel, Jess G. Sutliff and Harry R. Roberts and oral and documentary evidence having been introduced and the court now makes its consolidated findings of fact

and conclusions of law upon the aforesaid hearings, as follows:

Findings of Fact

I.

That the above named Bankrupt and Christine W. Allen were for several years prior to the 26th day of June, 1950, husband and wife. That on the 8th day of June, 1949, said parties made, executed and delivered a property settlement agreement, Respondent's Exhibit No. 1 herein, which provided among other things as follows:

"Eleventh: The parties hereto are the owners of the following described community property:

(1) That certain drug store business conducted in the Town of Lone Pine, County of Inyo, State of California, commonly known as Jerry's Mt. Whitney Drugstore * * *."

"Fourteenth: The drug store above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest. The drug store shall remain under the active management and control of the husband."

That said property settlement agreement was recorded in the office of the County Recorder of the County of Inyo on the 12th day of December, 1949.

II.

That the drug store known as Jerry's Drugstore located at 206 North Main Street in the Town of Lone Pine, State of California [47] was for several years prior to and on the 8th day of June, 1948, owned by the above-named Bankrupt and Respondent as community property; that in an action pending between the Bankrupt herein and Respondent in the Superior Court of the State of California in and for the County of Inyo entitled "Christine W. Allen, Plaintiff vs. Joseph E. Allen, Defendant," proceedings No. 4745 of said court, said court duly made and entered on the 9th day of June, 1949, an interlocutory decree of divorce in favor of the plaintiff therein and against the defendant therein, which interlocutory decree was introduced herein as Respondent's Exhibit 2; that by the terms of said interlocutory decree of divorce it was ordered, adjudged and decreed that the plaintiff therein was entitled to a divorce from the defendant therein; that said property settlement agreement was submitted to said court in said proceedings and was by said court approved and each of the parties thereto by the terms of said interlocutory decree of divorce was ordered to perform the same; that thereafter and on the 26th day of June, 1950, said court did duly make and enter a final decree of divorce in said proceedings in favor of the plaintiff therein and against the defendant therein, which final decree of divorce was introduced herein as Respondent's Exhibit 3; that by the terms of said final decree of divorce

it was ordered, adjudged and decreed by said court that the bonds of matrimony then existing between the plaintiff and the defendant therein be, and the same were, dissolved and said court did further by the terms thereof approve said property settlement agreement and ordered each of the parties thereto to perform the same.

III.

That neither the above-named Bankrupt nor Respondent herein filed with the County Clerk of Inyo County or published in a newspaper of general circulation a Notice of Intention to [48] transfer, hypothecate, sell or assign said drugstore business known as Jerry's Drugstore, located at 206 North Main Street, Lone Pine, California, or any assets thereof.

IV.

That prior to the granting of said interlocutory decree of divorce on June 9, 1949, the above-named bankrupt had been in possession of and had operated, managed and controlled said drugstore, and that at the time of the granting of said interlocutory decree of divorce the said bankrupt was in possession of the said drugstore and that the same was then operated, managed and controlled by him. That subsequent to the granting of said interlocutory decree of divorce on June 9, 1949, the above-named bankrupt continued to remain in possession of and to operate, manage and control said drug store until February 26, 1951, when he ceased operations; that although said drugstore

was closed since February 26, 1951, the above-named bankrupt remained in possession of said business; that upon appointment and qualification of Ralph Meyer, Receiver in Bankruptcy herein, the above-named bankrupt turned over to said Receiver all of the assets then in his possession; that said assets included, among other things, all of the assets belonging to, on the premises of, or used in connection with said drugstore.

V.

That at no time since June 9, 1949, did Respondent herein operate, manage, control or have possession of said drugstore.

VI.

That at no time prior to June 9, 1949, did Respondent manage, operate, control or have possession of said drugstore. [49]

VII.

That Respondent disclaims any right or title or interest in and to the frame and stucco building known as 206 North Main Street, Lone Pine, California; that said building is personal property belonging to the above-named bankrupt.

VIII.

That the Off-Sale Alcoholic Beverage License used in connection with the drugstore business was issued by the California State Board of Equalization to the above-named Bankrupt; that Respondent prior to June 9, 1949, was not named as licensee;

that subsequent to June 9, 1949, neither Bankrupt nor Respondent filed any application to transfer said license from the above-named Bankrupt to Bankrupt and Respondent, or any other person.

IX.

That the assets of said drugstore business at the time of the entry of said interlocutory decree of divorce consisted, and now consist, of an off-sale alcoholic beverage license issued by the State Board of Equalization of the State of California to and in the name of the above-named Bankrupt, a stock in trade of alcoholic beverages, a stock in trade of drugs, medicines and sundries, furniture and fixtures, accounts receivable and good will belonging to said business.

X.

That the above-named Bankrupt in operating said drugstore business incurred obligations from time to time, repaying said obligations from the receipts of said drugstore business; that the only creditor of the above-named Bankrupt who is now unpaid and whose obligation arose prior to the making of the aforementioned property settlement agreement between Bankrupt and Respondent is Lester A. Johnson; that [50] said indebtedness was evidenced by a promissory note executed jointly and severally by the above-named Bankrupt and Respondent.

XI.

That prior to the filing of the Voluntary Petition herein, Respondent filed an action in the Su-

perior Court of the State of California, in and for the County of Inyo, entitled Christine W. Allen vs. Joseph E. Allen, No. 5025; that said complaint was entitled "Complaint for Damages"; that the above-named Bankrupt, through his counsel, filed an Answer and Cross-Complaint wherein he prayed for partition of the said drugstore business or for sale thereof and partition of the proceeds; that the subject matter of said Cross-Complaint has been litigated in these proceedings; that Respondent contends the subject of her complaint relates to payments for alimony.

XII.

That prior to the filing by the above-named bankrupt of his Voluntary Petition herein, said bankrupt caused to be filed in this Court a Voluntary Petition entitled "In the Matter of Jerry's Drugstore, a co-partnership composed of Joseph E. Allen and Christine Allen, alleged bankrupt, proceeding No. in Bankruptcy 51832-C"; that the Respondent herein opposed the said petition upon the ground that she was not a partner in the said co-partnership; that upon a hearing in the said matter in this Court the said position of the Respondent was sustained and that it was adjudged that no co-partnership existed between the Bankrupt and the Respondent in the conduct of the drugstore business known as Jerry's Drugstore, and it was ordered that the said Petition be and that the same was dismissed. [51]

Conclusions of Law

I.

The Bankrupt having been in possession and control of that certain drugstore business known as Jerry's Drugstore, 206 North Main Street, Lone Pine, California, on the date of filing his Voluntary Petition in Bankruptcy herein, this court has jurisdiction of the subject matter to determine right, title and interest thereto.

II.

That title to the assets of the said drugstore business should be quieted in the trustee herein; that the interest which the Respondent acquired under the aforesaid property settlement agreement was, subsequent to the entry of the aforesaid interlocutory decree of divorce, an interest as a tenant in common in the net worth of the said business and not an interest in the assets thereof; that the transfer of the said interest to the Respondent is void as against the creditors and the trustee herein, upon the ground that it was not accompanied by an immediate delivery by the Bankrupt to the Respondent of the assets of the said business and was not followed by an actual and continued change of possession of such assets; that the transfer of the said interest, however, would not have been void as against the aforesaid Lester A. Johnson or the trustee herein by reason of the fact that no notice of intention to make such transfer was filed or published.

III.

That this court having taken jurisdiction of the subject matter before it, Respondent should be permanently restrained from proceeding with the action filed in the Superior Court of the State of California, in and for the County of Inyo, for partition; that she should be restrained [52] for a period of thirty days after discharge date of the above-named Bankrupt from proceeding with her action relative to damages or alimony.

Dated this 10th day of July, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 10, 1951, Referee. [53]

[Title of District Court and Cause.]

ORDER

The Court having heretofore made and caused to be filed its written Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed, as follows:

I.

This Court has jurisdiction over the matter, subject of these proceedings.

II.

That that certain drugstore business known as Jerry's Drugstore, 206 North Main Street, Lone Pine, California, shall be and it is hereby decreed to be an asset of the above-named estate.

III.

That title to the said property be and it is hereby quieted in the trustee herein; that Christine Allen has no right or title or interest or claim in or to said drugstore business or in or to the assets of the said business, or any portion thereof.

IV.

That title to the building located at 206 North Main [55] Street, Lone Pine, California, be and it is hereby quieted in the trustee.

V.

That Christine Allen, the Respondent herein, be and she is hereby permanently restrained from proceeding with that certain action entitled Christine W. Allen vs. Joseph E. Allen, No. 5025 in the Superior Court of the State of California, in and for the County of Inyo, insofar as said action relates to or deals with partition or sale of Jerry's Drugstore, 206 North Main Street, Lone Pine, California, or any portion of the assets belonging to the said business.

VI.

That Christine Allen, the Respondent herein, be and she is hereby restrained for a period of thirty

days from and after July 25, 1951, from proceeding with that certain action entitled Christine W. Allen vs. Joseph E. Allen, No. 5025 in the Superior Court of the State of California, in and for the County of Inyo, insofar as said action relates to damages or alimony.

Dated this 10th day of July, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed July 10, 1951, Referee. [56]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER QUIETING TITLE

To Benno M. Brink, Esq., Referee In Bankruptcy:

The petition of Christine Allen respectfully represents:

1. Your petitioner is aggrieved by the order herein of Benno M. Brink, Referee in Bankruptcy, dated the 10th day of July, 1951, a copy of which order is annexed hereto, marked "Exhibit A" and made a part hereof.

2. The Referee erred in respect to said order in that in his conclusion of law numbered II it was held that your petitioner acquired an interest as a tenant in common with the above-named bankrupt in the net worth of the drugstore business known

as Jerry's Drugstore, located in the Town of Lone Pine, State of California, and not in an interest in the assets thereof pursuant to the terms of the interlocutory decree of divorce made and entered the 9th day of June, 1949, in that certain action between your petitioner and the above-named bankrupt in the [57] Superior Court of the State of California in and for the County of Inyo entitled "Christine W. Allen, Plaintiff vs. Joseph E. Allen, Defendant" proceeding No. 4745 of said court, and which decree approved the terms of the property settlement agreement dated the 8th day of June, 1949, by and between your petitioner and the above-named bankrupt. Said conclusion of law is not sustained by said referee's findings numbered I and IX, the terms of said property settlement agreement (Petitioner's Exhibit No. 1), the terms of said interlocutory decree of divorce (Petitioner's Exhibit No. 2), or the terms of the final decree of divorce between said parties in said proceedings (Petitioner's Exhibit No. 3).

3. The referee erred in respect to said order in that in his conclusion of law numbered II it was held that your petitioner did not acquire and does not now own, an undivided one-half interest as a tenant in common with the above-named bankrupt in the assets of the business known as Jerry's Drugstore located in the Town of Lone Pine, State of California.

4. The referee erred in respect to said order in that in his conclusion of law numbered II it was

held that the conversion of your petitioner's community property interest in and to said drugstore business and the assets thereof to an undivided interest as a tenant in common with the above-named bankrupt in and to the said business and the assets thereof was a void transfer as against creditors and the trustee herein on the ground that the same was not accompanied by an immediate delivery of the assets of said business by the above-named bankrupt to your petitioner and was not followed by an actual and continued change of possession of said assets. Said conclusion of law is not sustained by said referee's findings numbered I and IX, the terms of said property settlement agreement (Petitioner's Exhibit No. 1), the terms of said interlocutory [58] decree of divorce (Petitioner's Exhibit No. 2) or the terms of the final decree of divorce between said parties in said proceedings (Petitioner's Exhibit No. 3).

5. The referee erred in respect to said order in that in his conclusion of law numbered II it was held that your petitioner acquired an interest as a tenant in common in the net worth of said drugstore business by the terms of said property settlement agreement and said conclusion of law is not sustained by and is at variance with said referee's finding numbered I, the terms of said property settlement agreement (Respondent's Exhibit No. 1), the terms of said interlocutory decree of divorce (Respondent's Exhibit No. 2) and said final decree of divorce (Respondent's Exhibit No. 3).

6. The referee erred in respect to said order in that it was adjudged therein that your petitioner has no right, title, or interest in or to the said drugstore business or in and to any of the assets thereto belonging.

Wherefore, your Petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, that said order be reversed, that your petitioner be adjudged to be the owner of an undivided one-half interest as a tenant in common of all the assets belonging to the business known as Jerry's Drugstore located in the Town of Lone Pine, State of California, and that your petitioner have such other and further relief as is just.

Dated July 18, 1951.

/s/ CHRISTINE ALLEN,
Petitioner.

JESS G. SUTLIFF, and
HARRY R. ROBERTS,

By /s/ HARRY R. ROBERTS,
Attorneys for Petitioner. [59]

State of California,
County of Los Angeles—ss.

Christine Allen, being first duly sworn, deposes and says: that she is the Petitioner in the above-entitled action; that she has read the foregoing petition for review of referee's order quieting title, and knows the contents thereof; and that the same

is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ CHRISTINE ALLEN.

Subscribed and sworn to before me this 18th day of July, 1951.

[Seal] /s/ GRACE B. HUNDLEY,
Notary Public in and for said
County and State.

My commission expires 2/3/52. [60]

EXHIBIT A

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 52057-HW

In the Matter of
JOSEPH E. ALLEN,

Bankrupt.

ORDER

The Court having heretofore made and caused to be filed its written Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed, as follows:

I.

This Court has jurisdiction over the matter, subject of these proceedings.

II.

That that certain drugstore business known as Jerry's Drugstore, 206 North Main Street, Lone Pine, California, shall be and it is hereby decreed to be an asset of the above-named estate.

III.

That title to the said property be and it is hereby quieted in the trustee herein; that Christine Allen has no right or title or interest or claim in or to said drugstore business or in or to the assets of the said business, or any portion thereof.

IV.

That title to the building located at 206 North Main [61] Street, Lone Pine, California, be and it is hereby quieted in the Trustee.

V.

That Christine Allen, the Respondent herein, be and she is hereby permanently restrained from proceeding with that certain action entitled Christine W. Allen vs. Joseph E. Allen, No. 5025 in the Superior Court of the State of California, in and for the County of Inyo, insofar as said action relates to or deals with partition or sale of Jerry's Drugstore, 206 North Main Street, Lone Pine, California, or any portion of the assets belonging to the said business.

VI.

That Christine Allen, the Respondent herein, be and she is hereby restrained for a period of thirty

days from and after July 25, 1951, from proceeding with that certain action entitled Christine W. Allen vs. Joseph E. Allen, No. 5025 in the Superior Court of the State of California, in and for the County of Inyo, insofar as said action relates to damages or alimony.

Dated this 10th day of July, 1951.

BENNO M. BRINK,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 18, 1951, Referee. [62]

In the District Court of the United States, Southern
District of California, Central Division
In Bankruptcy No. 52057-HW

In the Matter of
JOSEPH E. ALLEN,

Bankrupt.

ORDER ON PETITION FOR REVIEW

This matter having come on regularly for hearing in Courtroom No. 5 of the above-entitled Court, before the Honorable Harry C. Westover, Judge Presiding, the Trustee being represented by Dorothy Kendall, his attorney, and Christine Allen being represented by her attorneys, Harry R. Roberts and Jess G. Sutliff, and evidence having been introduced and argument having been had;

It Is Hereby Ordered, Adjudged and Decreed that the order of the Referee filed on July 10, 1951, wherein title to personal property was quieted in the Trustee, be and it is hereby affirmed.

Dated July 31, 1951.

/s/ HARRY C. WESTOVER,
Judge of the District Court.

Judgment Docketed and Entered July 31, 1951.

[Endorsed]: Filed July 31, 1951, U.S.D.C. [97]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Christine Allen does hereby appeal to the United States Court of Appeals, Ninth Circuit, from the order herein of the above-entitled court entered in this cause on the 31st day of July, 1951, which order affirmed the order herein of Benno M. Brink, Referee in Bankruptcy dated the 10th day of July, 1951.

Dated August 28, 1951.

HARRY R. ROBERTS, and

JESS G. SUTLIFF,

By /s/ HARRY R. ROBERTS,

Attorneys for Christine Allen.

[Endorsed]: Filed August 29, 1951, U.S.D.C.

RESPONDENT'S EXHIBIT No. 1

Exhibit "A"

Property Settlement and Child Custody Agreement

This Agreement, made and entered into this 8th day of June, 1949, by and between Joseph E. Allen, of Lone Pine, Inyo County, California, the party of the first part, hereinafter referred to as the husband, and Christine W. Allen, of Lone Pine, Inyo County, California, the party of the second part, hereinafter referred to as the wife,

Witnesseth:

Whereas, the parties hereto were lawfully married on or about the 31st day of December, 1933, and ever since said date have been and now are husband and wife; and

Whereas, the parties to this agreement have two minor children, Michael Gay Allen, [64] born November 8, 1940, and Patrick Francis Allen, born October 16, 1941; and

Whereas, in consequence of disputes and unhappy differences the parties hereto have separated and are now living separate and apart and since their separation have agreed to live separate and apart for the remainder of their natural lives; and

Whereas, it is mutually desired by the parties that a full and final adjustment of all their respective property rights, interest and claims he had, settled and determined by this agreement, both with respect to community interests and/or separate interests and/or the rights of inheritance from each to the other;

Respondent's Exhibit No. 1—(Continued)

Now, Therefore, in consideration of the mutual promises, covenants and agreements hereinafter set forth, made by each to the other, it is covenanted and agreed and promised by each party hereto to and with the other party as follows:

First: That, except as hereinafter provided, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all debts, liabilities and obligations of every kind and character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided.

Second: That any and all property acquired by either of the parties hereto from and after the date hereof shall be the sole and separate property of the one so acquiring the same, and each of said parties hereby respectively grants to the other all such future acquisitions of property as the sole and separate property of the one so acquiring the same.

Third: That except as hereinafter provided, each of the said parties shall have an immediate right to dispose of or bequeath by will his or her respective interests in and to any and all property

Respondent's Exhibit No. 1—(Continued)

belonging to him or her from and after the date hereof, and that said right shall extend to all of the aforesaid future acquisitions of property as well as to all property set over to either of the parties hereto under this agreement.

Fourth: That except as hereinafter provided, each of said parties hereto hereby waives any and all right to the estate of the other left at his or her death, and forever quitclaims any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waives any and all right of homestead in the real property of the other, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of each party in the estate of the other party shall be in effect, and they shall have all the rights of single persons and maintain the same relation of such toward each other.

Fifth: The wife does and shall accept the provisions herein made for her in full satisfaction of her right to the community property of the respective parties hereto, and in full satisfaction of her right to support and maintenance. The wife hereby covenants and agrees that she shall not and will not

Respondent's Exhibit No. 1—(Continued)

at any time hereafter contract any debts, charges or liabilities whatsoever for which the husband or his property or his estate shall or may become or be answerable, and that she will keep the husband free and harmless of and from any and all debts or liabilities which may hereafter be incurred by her. [65]

Sixth: That each of the respective parties shall be entitled to receive from the other proper conveyances, assignments, or other transfers to the end and purpose that the real property and personal property of the parties hereto may be made to appear of record ownership as hereinafter provided.

Seventh: Neither of the parties shall molest or annoy the other, or compel or endeavor to compel the other to cohabit or to dwell with him or her, as the case may be, by legal or other proceedings, for restoration of conjugal rights or otherwise. Neither party hereto shall, against the wish and desire of the other, call upon or visit the other, but this agreement shall not preclude any right or visitation pursuant to mutual agreement.

Eighth: The parties shall at any time or times hereafter, make, execute and deliver any and all further or other instruments, papers or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

Ninth: It is mutually agreed that this property settlement agreement may by either party be submitted to the court in which any action between the

Respondent's Exhibit No. 1—(Continued)

parties to this agreement is now pending, or may hereafter be pending, and that it shall be conclusive as to the rights of such parties, and may be incorporated in any judgment or decree rendered by the court having jurisdiction of the pending proceedings.

Tenth: The wife shall have the care, custody and control of said minor children, subject to the right of visitation by the husband at any and all reasonable times, which right of visitation shall include the right to have the children with him in his home for reasonable periods of time. The husband further promises and agrees that he will pay to the wife the sum of One Hundred and Twenty-five Dollars (\$125.00) per month as and for the support, maintenance and education of said minor children, until the youngest of said children reaches the age of twenty-one years, or becomes self-supporting, or until this agreement is modified by further contract of the parties or, for cause shown, by order of a court of competent jurisdiction.

It is further covenanted and agreed by the wife that she will pay, from the above funds or her personal funds, the premiums to become due on policies numbers M7976615 of the Prudential Insurance Company of America on the life of Michael C. Allen and on policy number M7978616 of the same company on the life of Patrick F. Allen.

Eleventh: The parties hereto are the owners of the following described community property:

Respondent's Exhibit No. 1—(Continued)

1. That certain drugstore business, conducted in the Town of Lone Pine, County of Inyo, State of California, commonly known as Jerry's Mt. Whitney Drugstore;

2. Household furniture, furnishings and equipment now in the home of the parties hereto in the Town of Lone Pine, County of Inyo, State of California;

3. Two unimproved lots in the Town of Lone Pine, County of Inyo, State of California;

4. One automobile;

5. Several United States Government savings bonds, Series E, having a maturity value of approximately \$300.00;

6. Policy No. 9138106 of the Prudential Insurance Company of America on the life of Christine Allen, in the principal amount of \$1,000.00, in which Joseph E. Allen is named beneficiary;

7. Policy No. 9138107 of the Prudential Insurance Company of America on the life of Joseph Evan Allen, in the principal amount of \$5,000.00, wherein Christine Allen is named beneficiary;

8. Policies Nos. 89641960, 89641961, 83894764, 83894806, 97073792, [66] 82000389, and 82000454, of the Prudential Insurance Company of America, collectively insuring the life of Joseph E. Allen in the principal amount of \$....., and payable to the executor or administrator of the

Respondent's Exhibit No. 1—(Continued)

insured or other persons designated in general terms by the provisions of said policies.

Twelfth: The wife shall receive, as her sole and separate property, and the husband does hereby transfer, set over and assign and convey to the wife as her sole and separate property, the United States savings bonds, the household furniture, furnishings and equipment, and Policy No. 9138106 of the Prudential Insurance Company of America, wherein the wife is named as the insured.

Thirteenth: The husband shall receive, as his sole and separate property, and the wife does hereby transfer, set over, assign and convey to the husband as his sole and separate property, the lots of land situate in the Town of Lone Pine, County of Inyo, State of California, the automobile, and the insurance policies on the life of the husband; provided, however, that the husband shall not be authorized to change the beneficiaries designated in said insurance policies unless and until the wife has been paid the sum of \$15,000.00 and the trust fund of \$10,000.00 for said children established as set forth in paragraph fourteenth hereof.

Fourteenth: The drugstore above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest. The drugstore shall remain under the active management and control of the husband. In the event that said drugstore

Respondent's Exhibit No. 1—(Continued)

is sold, there shall be paid to the wife the sum of fifteen thousand dollars (\$15,000.00) from the proceeds of such sale, in full satisfaction of her right, title and interest in and to the drugstore, and upon such sale the husband shall establish a trust fund in the amount of ten thousand dollars (\$10,000.00) for the use of said minor children at any time their needs may require it, but primarily for the purpose of obtaining a higher education for them. In the event such trust fund is established, Dr. George Wilson, of Pasadena, California, shall be named as sole trustee. In the event of the death, inability or incapacity of the said Dr. Wilson to act, then the parties to this agreement or the survivor of them shall substitute as such trustee. It is further understood and agreed that the husband may at any time acquire all the right, title and interest of the wife in and to said drugstore by the payment to her of the sum of \$15,000.00 and the establishment of said trust fund above referred to.

Unless said business is sooner sold, the husband shall purchase the interest of the wife in said business, according to the provisions of Paragraph Fourteenth of this agreement, on or before the 15th day of December, 1951.

Said purchase price may be paid by the payments of said amounts in a lump sum, or at the option of the husband by an initial payment of five thousand dollars (\$5,000.00) and the balance in monthly installments of three hundred dollars (\$300.00) or more, including interest at five per cent per annum

Respondent's Exhibit No. 1—(Continued)

on the amounts from time to time remaining unpaid. Upon the payment of the initial deposit, the husband shall receive from the wife a bill of sale to said business, and shall execute and deliver to her a chattel mortgage on all of the trade fixtures and equipment of said business, a first lien, as security for the payment of the balance due to the wife and for the establishment of the trust fund. Such chattel mortgage shall contain a provision to the effect that at no time until its obligation has been discharged will the husband permit the stock in trade to fall below the value of \$18,000.00. As soon as said sum of \$15,000.00 shall have been paid to the wife in the foregoing manner, [67] the husband shall commence the establishment of said trust fund by the payment of \$300.00 or more each month for such purpose, until the entire principal sum of \$10,000.00 shall have been paid.

Pending the sale of such business or the acquisition of the wife's interest, by the husband, either by payment of the full purchase price or election to purchase on the installment basis as hereinabove provided for, the husband shall pay to the wife the sum of two hundred twenty-five dollars (\$225.00) per month, and all other proceeds derived from the operation of said business shall become the sole and separate property of the husband, as well as the damages which the husband may recover from Ben B. Baker and Rupert Renfrow or either of them in the action now pending against them. It is further understood and agreed that in the event the net

Respondent's Exhibit No. 1—(Continued)

profits of said business for four successive months shall ever fall below an average of \$700.00 per month, the amount of payments required under the terms hereof may be reduced by mutual agreement of the parties; and if no agreement can be reached, the husband shall be authorized to petition a court of competent jurisdiction for such purpose, which court shall have the authority to modify the Provisions hereof as to monthly payments in such manner as to such court may appear meet and proper under the circumstances. The monthly payments required by the terms hereof shall in no way reduce the principal amount of \$15,000.00 payable to the wife nor the \$10,000.00 trust fund to be established for the children. Upon the payment of said sum of \$15,000.00 to the wife and the establishment of said trust fund, all obligation of the husband to pay to the wife and sum or sums whatsoever, except for the support and maintenance of said children, shall cease and determine.

Fifteenth: Each of the parties hereto does expressly promise and agree that all of the property above referred to shall by each of said parties be by will devised and bequeathed to the other, or to said minor children, and that the insurance policies on the life of each party shall continue to name the other, or said minor children, as the beneficiary, until such time as either party to this agreement may lawfully remarry, in which event each of the parties hereto shall be released from the obligation of this paragraph. Provided further, that the termi-

Respondent's Exhibit No. 1—(Continued)

nation of the obligations of this paragraph shall not authorize the husband to change the beneficiaries of the policies of insurance on his life prior to the time when there shall have been paid to the wife the sums of money, and his establishment of the trust fund referred to, under the provisions of paragraph fourteenth hereof.

Sixteenth: It is mutually understood and agreed that one acre of land in the County of Los Angeles, State of California, standing in the name of the husband, was acquired prior to the marriage of the parties hereto and is his separate property.

Seventeenth: (a) It is stipulated that the wife has retained Glenn E. Tinder, and attorney at law duly licensed to practice in the State of California, to advise her in connection with this agreement; and the husband hereby agrees to pay to said attorney, as additional support for the wife, the sum of \$25.00 to compensate him for his services in that connection.

(b) If either party shall hereafter institute suit for divorce against the other, in any court of competent jurisdiction, the husband hereby agrees to pay to the wife, or to her nominee, as additional support of the wife, the sum of \$159.00, which shall be in full satisfaction of any legal obligation of the husband to reimburse her for attorney fees and costs in connection with such action.

(c) The wife hereby agrees that the payments provided for in this paragraph shall be and are in full satisfaction of any and all obligations of the

Respondent's Exhibit No. 1—(Continued)

husband for attorney fees or costs in connection with this agreement of such divorce action; provided, however, that if it shall hereafter be necessary for the wife to employ counsel to enforce this agreement [68] or to take any other action not herein referred to, the wife reserves the right to apply to any court of competent jurisdiction for such attorney fees and costs as she may be then entitled to, and the husband agrees to pay reasonable fees and costs in such event.

Eighteenth: Each of the parties hereto does hereby solemnly and specifically aver that he or she has read this agreement and understands the same; that each has had independent legal advice by counsel of his or her own selection; that this agreement has been entered into without undue influence or fraud or coercion or misrepresentation, or for any cause other than herein specified, and that each party executes this agreement freely and voluntarily.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ JOSEPH E. ALLEN,

Joseph E. Allen, the Husband.

/s/ CHRISTINE W. ALLEN,

Christine W. Allen, the Wife.

Respondent's Exhibit No. 1—(Continued)

Approved:

/s/ HUGH E. BRIERLY,
Attorney for the Husband.

/s/ GLENN E. TINDER,
Attorney for the Wife.

State of California,
County of Inyo—ss.

On this 8th day of June, 1949, before me, the undersigned, a Notary Public in and for said county and state, personally appeared Joseph E. Allen and Christine W. Allen, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] /s/ HUGH E. BRIERLY,
Notary Public in and for the County of Inyo, State
of California.

Filed for record at the request of Jerry Allen 2
minutes past 10 o'clock a.m., Dec. 12, 1949.

#57 Fee \$3.90.

RICHARD F. OYLER,
Recorder.

Respondent's Exhibit No. 1—(Continued)

County Recorder's Office

State of California,
County of Inyo—ss.

I, Richard F. Oyler, County Recorder of the County of Inyo, State of California, do hereby certify the foregoing to be a full, true and correct copy of Property Settlement Agreement, recorded December 12, 1949, as the same appears on record in my office in Volume 81 of Official Records at page 215, Records of Inyo County.

Witness my hand and seal of said County Recorder this 14th day of June, 1951.

RICHARD F. OYLER,
County Recorder.

By /s/ DONALD L. BELL,
Deputy.

[Endorsed]: Filed June 19, 1951.

RESPONDENT'S EXHIBIT No. 2

In the Superior Court of the State of California
in and for the County of Inyo

CHRISTINE W. ALLEN,

Plaintiff,

vs.

JOSEPH E. ALLEN,

Defendant.

INTERLOCUTORY DECREE OF DIVORCE

It appearing to the court that defendant, Joseph E. Allen, was served with the summons issued in this action and that said defendant has filed herein his appearance and waiver, reference to the same being hereby made, and the default of said defendant having been duly and regularly entered, and this cause coming on regularly to be heard this 9th day of June, 1949, upon plaintiff's complaint herein and upon the proofs taken herein from which it appears and the court finds that all the allegations of the complaint are true and that they are sustained by the testimony of plaintiff, which was corroborated by other testimony, and all and singular the law and the premises being by the court here understood and fully considered:

Wherefore, it is ordered, adjudged, and decreed, and this court does hereby order, adjudge, and decree as and for an interlocutory judgment herein, that the plaintiff ought to be granted a divorce from the defendant and that she is entitled to an

interlocutory judgment of this court adjudging that she has established grounds for the dissolution of the bonds of matrimony heretofore and now existing between said plaintiff and defendant; and pursuant to the statute in such case made and provided, such interlocutory judgment is hereby made on the ground of extreme cruelty.

It is further ordered, adjudged and decreed that the property settlement and child custody agreement, an executed copy of which was filed with the Court on this date, be and the same is hereby approved in all respects, and each party thereto is hereby ordered and directed to meet and observe the obligations therein contained incumbent upon them respectively.

Done in open Court this 9th day of June, 1949.

/s/ WM. D. DEHY,

Judge of the Superior Court.

Certified true copy.

[Endorsed]: Filed June 9, 1949, County Clerk.

[Endorsed]: Filed June 19, 1951, Referee. [70]

RESPONDENT'S EXHIBIT No. 3

In the Superior Court of the State of California
in and for the County of Inyo

CHRISTINE W. ALLEN,

Plaintiff,

vs.

JOSEPH E. ALLEN,

Defendant.

FINAL DECREE OF DIVORCE

It appearing to the court and the court finding that an interlocutory judgment adjudging and declaring that the Plaintiff was entitled to a divorce from the Defendant was entered in the above-entitled action on the 9th day of June, 1949, and recorded in Judgment Book 8 of said Court at page 186; that one year has expired since the entry of said interlocutory judgment, and said action has not been dismissed; that no appeal has been taken from said interlocutory judgment and no motion for a new trial has been made, and that there is no reason why a final judgment granting divorce should not be made and entered herein;

And all and singular the law and the facts being by the court understood and fully considered;

Wherefore, it is here Ordered, Adjudged, and Decreed and this court does hereby order, adjudge, and decree that the marriage between said plaintiff, Christine W. Allen, and said defendant, Joseph E. Allen, be dissolved, and the same is hereby dissolved upon the ground of extreme cruelty, and

the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all the obligations thereof, and restored to the status of single persons.

It is further ordered, adjudged and decreed that the property settlement and child custody agreement, an executed copy of which was filed with the Court and submitted to the Court for its approval, be and the same is hereby approved in all respects, and each party thereto is hereby ordered and directed to meet and observe the obligations therein contained incumbent upon them respectively.

Done in open Court this 23rd day of June, 1950.

/s/ ERNEST D. WAGNER,

Judge of the Superior Court.

I hereby certify that the decree, of which the within is a true copy, was entered in Judgment Book 8 at page 264 of the above-entitled court on the 26th day of June, 1950.

[Seal] FAY LAWRENCE,
Clerk.

By /s/ TILLIE STEELE,
Deputy Clerk.

[Superior Court Seal.]

[Endorsed]: Filed June 26, 1950, County Clerk.

[Endorsed]: Filed June 19, 1951, Referee. [71]

RESPONDENT'S EXHIBIT No. 4

In the Superior Court of the State of California
in and for the County of Inyo
No. 5025

CHRISTINE W. ALLEN,

Plaintiff,

vs.

JOSEPH E. ALLEN,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants, and alleges:

I.

That on June 8th, 1949, plaintiff and defendant being then married to each other, entered into a property settlement agreement which provided, among other things, the following:

“Tenth: The wife shall have the care, custody and control of said minor children, subject to the right of visitation by the husband at any and all reasonable times, which right of visitation shall include the right to have the children with him in his home for reasonable periods of time. The husband further promises and agrees that he will pay to the wife the sum of One Hundred and Twenty-five Dollars (\$125.00) per month as and for the support, maintenance and education of said minor children, until the youngest of said children reaches the age of twenty-one years, or becomes self-supporting, or [72] until this agreement is

Respondent's Exhibit No. 4—(Continued)
modified by further contract of the parties or, for cause shown, by order of a court of competent jurisdiction.

“It is further covenanted and agreed by the wife that she will pay, from the above funds or her personal funds, the premiums to become due on policies number M7978615 of the Prudential Insurance Company of America on the life of Michael G. Allen and on policy number M7978616 of the same company on the life of Patrick F. Allen.”

“Fourteenth: * * * Pending the sale of such business or the acquisition of the wife's interest, by the husband, either by payment of the full purchase price or election to purchase on the installment basis as hereinabove provided for, the husband shall pay to the wife the sum of two hundred twenty-five dollars (\$225.00) per month, and all other proceeds derived from the operation of said business shall become the sole and separate property of the husband, as well as the damages which the husband may recover from Ben B. Baker and Rupert Renfrow or either of them in the action now pending against them. It is further understood and agreed that in the event the net profits of said business for four successive months shall ever fall below an average of \$700.00 per month, the amount of payments required under the terms hereof may be reduced by mutual agreement of the parties; and if no agreement can be reached, the husband shall be authorized to petition a court of competent jurisdiction for such purpose, which

Respondent's Exhibit No. 4—(Continued)

court shall have the authority to modify the provisions hereof as to monthly payments in such manner as to such court may appear meet and proper under the circumstances. The monthly payments required by the terms hereof shall in no way reduce the principal amount of \$15,000.00 payable to the wife nor the \$10,000.00 trust fund to be established for the children. Upon the payment of said sum of \$15,000.00 to the wife and the establishment of said trust fund, all obligation of the husband to pay to the wife any sum or sums whatsoever, except for the support and maintenance of said children shall cease and determine." [73]

II.

That under the terms of said agreement defendant became indebted to the plaintiff in the sum of Six Thousand Six Hundred Fifty and no/100 Dollars (\$6,650.00), as follows:

a. For and on account of support of the minor children at the rate of \$125.00 per month from June 9th, 1949, to January 9th, 1951, the sum of \$2375.00; and,

b. For and on account of the monthly payments owing plaintiff at the rate of \$225.00 per month from June 9th, 1949, to January 9th, 1951, the sum of \$4275.00.

III.

That defendant has paid to plaintiff an account of said indebtedness the sum of \$3600.00 as follows:

Respondent's Exhibit No. 4—(Continued)

Date Due	Amount Received	Date Received
June 9th to July 9th	\$ 350.00	6/ 7/49
July 9th to Aug. 9th	350.00	7/28/49
Aug. 9th to Sept. 9th	175.00	9/ 3/49
Aug. 9th to Sept. 9th	175.00	9/12/49
Sept. 9th to Oct. 9th	150.00	9/23/49
Sept. 9th to Oct. 9th	200.00	10/31/49
Oct. 9th to Nov. 9th	250.00	12/ 3/49
Oct. 9th to Nov. 9th	100.00	12/24/49
Oct. 9th to Nov. 9th	150.00	12/24/49
Nov. 9th to Dec. 9th	100.00	2/ 4/50
Nov. 9th to Dec. 9th	100.00	3/ 2/50
Nov. 9th to Dec. 9th	50.00	3/ 2/50
Dec. 9th to Jan. 9th	150.00	4/ 1/50
Dec. 9th to Jan. 9th	150.00	4/29/50
Dec. 9th to Jan. 9th	300.00	6/ 1/50
Jan. 9th to Feb. 9th	50.00	7/ 5/50
Jan. 9th to Feb. 9th	100.00	7/ 5/50
Feb. 9th to Mar. 9th	150.00	8/ 4/50
Feb. 9th to Mar. 9th	100.00	9/ 3/50
Mar. 9th to Apr. 9th	50.00	9/ 3/50
Mar. 9th to Apr. 9th	150.00	10/11/50
Mar. 9th to Apr. 9th	125.00	12/ 2/50
Apr. 9th to May 9th	125.00	1/.. /51
Total Received	<hr/> \$3600.00	

Respondent's Exhibit No. 4—(Continued)

Recapitulation

Amount due June 9th, 1949, to January 9th, 1951, at \$350.00 per month.....	\$6650.00
Amount received	3600.00
	<hr/>
Amount unpaid Jan. 9th, 1951....	3050.00

IV.

That as of January 9th, 1951, there became due, owing and unpaid from defendant to plaintiff the sum of Three Thousand Fifty 00/100 Dollars (\$3,050.00), under the terms of said agreement.

V.

That although plaintiff has demanded of defendant payment of said sum, defendant has failed, refused and neglected to pay the same or any part thereof and the whole thereof is now due, owing and unpaid.

VI.

That the said property settlement agreement provides also, among other things, as follows:

“Seventeenth:

“(c) The wife hereby agrees that the payments provided for in this paragraph shall be and are in full satisfaction of any and all obligations of the husband for attorney fees or costs in connection with this agreement or such divorce action; provided, however, that if it shall hereafter be necessary for the wife to em-

Respondent's Exhibit No. 4—(Continued)
ploy counsel to enforce this agreement or to take any other action not herein referred to, the wife reserves the right to apply to any court of competent jurisdiction for such attorney fees and costs as she may be then entitled to, and the husband agrees to pay reasonable fees and costs in such event."

VII.

That by reason of the failure by defendant to make the payments as provided by said agreement it has become necessary for plaintiff to employ counsel to enforce the same and by reason thereof plaintiff has incurred an obligation to pay Jess G. Sutliff attorney's fees for services rendered herein and plaintiff has incurred costs of suit in the prosecution of this action.

VIII.

Plaintiff alleges that the sum of \$350.00 is a reasonable sum [75] to be allowed for attorney's fees herein and the sum of \$100.00 is a reasonable sum to be allowed for costs of suit.

Wherefore, plaintiff prays judgment as follows:

1. The sum of \$3,050.00 together with interest thereon at the rate of seven per cent per annum from March 9th, 1950, until paid;
2. The sum of \$350.00 for attorney's fees;
3. The sum of \$100.00 for costs of suit; and,

Respondent's Exhibit No. 4—(Continued)

4. For such other and further relief as to this Court may seem just.

/s/ CHRISTINE W. ALLEN,
Plaintiff.

.....
Jess G. Sutliff,
Attorney for Plaintiff.

State of California,
County of Los Angeles—ss.

Christine W. Allen, being first duly sworn, deposes and says: that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ CHRISTINE W. ALLEN,

Subscribed and sworn to before me this 30th day of January, 1951.

/s/ ARTHUR S. HIGGINS,
Notary Public in and for said
County and State.

My Commission Expires Mar. 10, 1952.

Respondent's Exhibit No. 4—(Continued)

In the Superior Court of the State of California
in and for the County of Inyo

No. 5025

CHRISTINE W. ALLEN,

Plaintiff and Cross-Defendant,

vs.

JOSEPH E. ALLEN,

Defendant and Cross-Complainant.

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Joseph E. Allen, and answers the alleged cause of action contained in plaintiff's complaint on file herein as follows:

I.

Answering paragraph I in said complaint contained defendant admits that on June 8, 1949, plaintiff and defendant being then married to each other, entered into a property settlement agreement containing among others the provisions set forth in said paragraph I of plaintiff's complaint.

II.

The defendant denies each and every allegation in paragraph II in said complaint contained and specifically denies that he, the said defendant, became indebted to the plaintiff in the sum of Six thousand six hundred fifty dollars (\$6,650.00), or

Respondent's Exhibit No. 4—(Continued)

any sum or sums whatsoever exceeding the sum of Three thousand seven hundred dollars [77] (\$3,700.00).

III.

Further answering the allegations in paragraph II in said complaint contained, defendant admits that he became indebted to plaintiff on account of support of minor children at the rate of One hundred twenty-five dollars (\$125.00) per month from June 9, 1949, to January 9, 1951, in the sum of Two thousand three hundred seventy-five dollars (\$2,375.00), but alleges that said sum of Two thousand three hundred seventy-five dollars (\$2,375.00) was fully paid prior to the institution of this action. Defendant specifically denies that he became indebted to plaintiff in the sum of Four thousand two hundred seventy-five dollars (\$4,275.00), or in any sum or sums whatsoever, for and on account of monthly payments in said complaint referred to.

IV.

Answering paragraph III defendant alleges that during the period or periods described in said paragraph III in said complaint contained he, the said defendant, paid to plaintiff the sum of Three thousand seven hundred dollars (\$3,700.00), and not the sum of Three thousand six hundred dollars (\$3,600.00) as in said complaint alleged.

V.

Further answering the allegations in paragraph III in said complaint contained, defendant denies

Respondent's Exhibit No. 4—(Continued)
that there was unpaid to plaintiff on the 9th day of January, 1951, or on any other date or dates whatsoever, the sum of Three thousand fifty dollars (\$3,050.00) or any other sum or sums whatsoever.

VI.

Answering paragraph IV in plaintiff's complaint contained, defendant denies generally and specifically that as of January 9, 1951, or as of any other date whatsoever, there became due, owing and unpaid from him, the said defendant, to plaintiff, the sum of Three thousand fifty dollars (\$3,050.00), under the terms of the agreement set forth in plaintiff's complaint or under any other terms, agreement or act whatsoever. [78]

VII.

Answering paragraph V in plaintiff's complaint contained, defendant denies generally and specifically that the sum of Three thousand fifty dollars (\$3,050.00), or any other sum or sums whatsoever, is now due, owing and unpaid by him, the said defendant, to plaintiff.

VIII.

Answering paragraph VI in plaintiff's complaint contained defendant admits that the property settlement agreement therein referred to contains, among other things, the paragraph recited in plaintiff's complaint.

IX.

Answering paragraph VII in plaintiff's complaint contained, defendant denies generally and

Respondent's Exhibit No. 4—(Continued)

specifically that he failed or neglected to make any of the payments as provided by said agreement, and denies that it became necessary for plaintiff to employ counsel to enforce the property settlement agreement in said complaint referred to, and alleges that if said plaintiff has incurred an obligation to pay Jess G. Sutliff attorney's fees for services rendered herein that said obligation was wholly unnecessary and is not the obligation of this defendant.

X.

Answering paragraph VIII in said complaint contained, defendant denies that the sum of Three hundred fifty dollars (\$350.00), or any other sum or sums whatsoever, is a reasonable sum to be allowed for attorney's fees herein, and further denies that the sum of One hundred dollars (\$100.00), or any other sum or sums whatsoever, is a reasonable sum to be allowed for costs of suit.

For a Further and Separate Defense to the Alleged Cause of Action Contained in Plaintiff's Complaint on File Herein, Defendant Alleges:

I.

That by the terms of paragraph fourteen of the property settlement agreement referred to in plaintiff's complaint herein, which said paragraph is recited at lines eight (8) to thirty (30), inclusive, on page two (2) of plaintiff's complaint, defendant agreed to pay to plaintiff the sum of [79] Two

Respondent's Exhibit No. 4—(Continued)
hundred twenty-five dollars (\$225.00) per month from the proceeds derived from the operation of a certain drugstore business in the Town of Lone Pine, County of Inyo, State of California; that from and after the execution of said agreement proceeds were not derived from the operation of said business in an amount sufficient to pay said sum of Two hundred twenty-five dollars (\$225.00) per month; that by the terms of said agreement said payment of Two hundred twenty-five dollars (\$225.00) per month was restricted to payment from a specific fund, to wit, the proceeds from said business, and that said fund has not at any time during the period or periods stated in plaintiff's complaint herein existed; that by reason thereof defendant has not become indebted to plaintiff for said sums of Two hundred twenty-five dollars (\$225.00) per month.

And for a Further and Separate Defense to Said Alleged Cause of Action Contained in Plaintiff's Complaint on File Herein, Defendant Alleges:

I.

That by the terms and provisions of paragraph fourteen of the property settlement agreement between plaintiff and defendant referred to and recited at lines eight (8) to thirty (30), inclusive, to plaintiff's complaint, it was understood and agreed by and between plaintiff and defendant that in the event the net profits of that certain drug-

Respondent's Exhibit No. 4—(Continued)

store business in the Town of Lone Pine, County of Inyo, State of California, for four (4) successive months, should ever fall below an average of Seven hundred dollars (\$700.00) per month, the amount of payments required under the terms of said agreement might be reduced by mutual agreement of the parties; that at no time and for no period since the execution of said agreement have the net profits of said business for four (4) successive months ever reached an average of Seven hundred dollars (\$700.00) per month, but have for each four (4) successive months' period since the execution of said agreement fallen below said average of Seven hundred dollars (\$700.00) per month; that by said agreement it was the intention of the parties that in such event or events no obligation of monthly payments to plaintiff thereunder should secure, and that defendant did not [80] become indebted to plaintiff for said payments as in plaintiff's complaint alleged. [81]

For a Cross-Complaint Against Plaintiff and Cross-Defendant, Defendant and Cross-Complainant Alleges:

I.

That on the 8th day of June, 1949, defendant and cross-complainant made and entered into a written agreement with plaintiff and cross-defendant, a copy of which is attached hereto and marked "Exhibit A."

Respondent's Exhibit No. 4—(Continued)

II.

That by the terms of said agreement it was provided in paragraph fourteen thereof at page seven (7) that pending the sale of the business therein referred to the defendant and cross-complainant should pay to the wife the sum of Two hundred twenty-five dollars (\$225.00) per month, provided, however, that in the event the net profits of the business in said agreement referred to for four (4) successive months should ever fall below an average of Seven hundred dollars (\$700.00) per month, the amount of payments required under the terms of said agreement might be reduced by mutual agreement of the parties, or, if no agreement could be reached, the defendant and cross-complainant should be authorized to petition a Court of competent jurisdiction for such purpose, which said Court should have the authority to modify the provisions herein referred to as to monthly payments in such manner as to such Court might appear meet and proper under the circumstances.

III.

That subsequent to the agreement aforesaid defendant and cross-complainant continued to and did operate the business in said agreement referred to from and after the 8th day of June, 1949, and that during no period of four (4) successive months did the net profits of said business average Seven hundred dollars (\$700.00) per month; that defend-

Respondent's Exhibit No. 4—(Continued)

ant and cross-complainant has attempted to reduce the said payments by mutual agreement with plaintiff and cross-defendant but that no agreement can be reached, and that the defendant and cross-complainant is entitled to a decree and judgment of this Court modifying the terms of the agreement herein referred to and the monthly payments aforesaid in such manner as to this Court may appear meet and proper under the circumstances. [82]

IV.

That defendant and cross-complainant has no adequate remedy at law under the premises.

As a Second Separate and Distinct Cause of Action
Defendant and Cross-Complainant Alleges:

I.

That the defendant and cross-complainant and the plaintiff and cross-defendant are co-owners, as tenants in common, of all and singular the following personal property, to wit:

That certain drugstore business conducted in the Town of Lone Pine, County of Inyo, State of California, commonly known and referred to as "Jerry's Mt. Whitney Drugstore," together with all and singular the fixtures, equipment, supplies, and stock-in-trade of said business, including the goodwill thereof and all accounts receivable thereof.

That defendant and cross-complainant has an undivided one-half interest in said property and busi-

Respondent's Exhibit No. 4—(Continued)
ness and that plaintiff and cross-defendant has an undivided one-half interest therein.

II.

That the defendant and cross-complainant herein desires a partition of said property above described; that the parties hereto have been unable to agree as to the manner in which said property shall be divided.

III.

That no person other than the defendant and cross-complainant and the said plaintiff and cross-defendant is interested in said property, or any part thereof, as owner or otherwise.

Wherefore, defendant and cross-complainant prays that plaintiff and cross-defendant take nothing by her complaint herein, and that he have judgment on his cross-complaint as follows:

1. That the property settlement agreement herein referred to be modified, and the monthly payments of Two hundred twenty-five dollars (\$225.00) per month provided for in said agreement be reduced in an amount and manner which shall by this Court be deemed meet and proper under the circumstances.

2. For the partition of said personal property according to the [83] respective rights of the parties hereto, or if parition cannot be had without great prejudice to the owners, then for the sale thereof

Respondent's Exhibit No. 4—(Continued)
and partition of the proceeds according to the respective interests of the parties hereto.

3. For costs of suit and for such other and further relief as to the Court may seem proper in the premises.

JOSEPH E. ALLEN,
Defendant and Cross-
Complainant. [84]

State of California,
County of Inyo—ss.

Joseph E. Allen, being by me first duly sworn, deposes and says: That he is the Defendant and Cross-Complainant in the above-entitled action; that he has read the foregoing Answer and Cross-Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes is to be true.

/s/ JOSEPH E. ALLEN.

Subscribed and sworn to before me this 20th day of February, 1951.

[Seal] /s/ WILLIS SMITH,
Notary Public in and for Said County and State of
California. [85]

Respondent's Exhibit No. 4—(Continued)

Exhibit A

Property Settlement and
Child Custody Agreement

[Identical to Respondent's Exhibit No. 1. See
pages 49 to 62 of this printed record.]

In the Superior Court of the State of California
In and for the County of Inyo

No. 5025

CHRISTINE W. ALLEN,

Plaintiff,

vs.

JOSEPH E. ALLEN,

Defendant.

JOSEPH E. ALLEN,

Cross-Complainant,

vs.

CHRISTINE W. ALLEN,

Cross-Defendant.

ANSWER TO CROSS-COMPLAINT

Comes now cross-defendant, Christine W. Allen,
and answering cross-complainant's alleged cross-
complaint admits, denies and alleges: [95]

I.

Answering paragraph III, page 6, this cross-
defendant denies that during no period of four

Respondent's Exhibit No. 4—(Continued)

successive months did the net profits of the business mentioned average \$700.00 per month; denies that defendant and cross-complainant have attempted to reduce the payments by mutual agreement; denies that no agreement can be reached; denies that defendant and cross-complainant are entitled to a decree and judgment modifying the terms of the agreement referred to.

II.

Denies the allegations contained in Paragraph II, Page 7, of said alleged cross-complaint.

Wherefore, cross-defendant prays judgment as set forth in her original complaint.

/s/ CHRISTINE W. ALLEN.

/s/ JESS G. SUTLIFF,
Attorney for Plaintiff and
Cross-Defendant.

State of California,
County of Los Angeles—ss.

Christine W. Allen, being first duly sworn, deposes and says: That she is the plaintiff and cross-defendant in the above-entitled action; that she has read the foregoing Answer to Cross-Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ CHRISTINE W. ALLEN.

Respondent's Exhibit No. 4—(Continued)

Subscribed and sworn to before me this 26th day of February, 1951.

ARTHUR S. HIGGINS,

Notary Public in and for Said
County and State.

My Commission Expires March 10, 1952.

Certified true copy.

[Endorsed]: Filed January 31, 1951, County Clerk.

[Endorsed]: Filed June 21, 1951, Referee. [96]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 106, inclusive, contain the original Debtor's Petition; Orders of Adjudication and General Reference; Referee's Certificate on Petition for Review of Order in re Title to a Certain Drug Store Business; Proceedings to Determine Title and Order to Show Cause; Order to Show Cause filed May 24, 1951; Answer to Receiver's Petition for Turnover; Amended Answer to Receiver's Petition for Turnover; Petition to Determine Title to Personal Property and Order to Show

Cause; Order to Show Cause filed June 12, 1951; Petition for Restraining Order and Order to Show Cause; Order to Show Cause filed June 12, 1951; Answer to Trustee's Petition for Restraining Order and Order to Show Cause; Answer to Receiver's Petition to Determine Title to Personal Property and Order to Show Cause; Findings of Fact and Conclusions of Law re: (1) Determination of Title to Personality; (2) Restraining State Court Litigation; Order; Petition for Review of Referee's Order Quieting Title; Respondent's Exhibits 1, 2, 3 and 4; Order on Petition for Review; Notice of Appeal; Cost Bond on Appeal; and Two Designations of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5th day of October, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13126. United States Court of Appeals for the Ninth Circuit. Christine Allen, Appellant, vs. Ralph Meyer, Trustee in Bankruptcy of the Estate of Joseph E. Allen, Bankrupt, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed October 6, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 131261

In the Matter of:

JOSEPH E. ALLEN,

Bankrupt.

STATEMENT OF POINTS AND DESIGNA-
TION OF PORTIONS OF RECORD TO
BE PRINTED

The points on which appellant intends to rely in this Court in this case are as follows:

1. The Court erred in holding that the interest acquired by appellant under the property settlement agreement was an interest in the net worth of the business in question and not an interest in the assets thereof pursuant to the terms of the interlocutory decree of divorce.

2. The Court erred in holding that the appellant did not acquire and does not now own an undivided one-half interest as a tenant in common with the bankrupt in the assets of the business known as Jerry's Drugstore.

3. The Court erred in holding that the conversion of appellant's community property interest in and to the drugstore business as a tenant in common with the bankrupt in and to said business and the assets thereof, was a void transfer as against creditors and the Trustee in bankruptcy on the

ground that the same was not accompanied by an immediate delivery of the assets of said business by the bankrupt to appellant and was not followed by an actual and continued change of possession of said assets. Said holding is not sustained by the referee's findings numbered I and II; the terms of the property settlement agreement; the terms of the interlocutory decree of divorce, or the terms of the final decree of divorce.

4. The Court erred in holding that appellant acquired an interest as a tenant in common in the net worth of said drugstore business by the terms of said property settlement agreement. Said holding is not sustained by referee's finding number I; the terms of said property settlement agreement; the terms of said interlocutory decree of divorce, or the terms of the final decree of divorce.

5. The Court erred in holding that appellant has no right, title, or interest in and to any of the assets of said business and also no right, title, or interest in and to the said drugstore business.

Portions of Record

Only the following portions of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

1. Proceedings to determine title and order to show cause, filed May 24th, 1951.

2. Amended answer to receiver's petition for turnover, filed June 11, 1951.

3. Petition to determine title to personal property and order to show cause, filed June 12, 1951.

4. Petition for restraining order and order to show cause, filed June 12, 1951.

5. Answer to Trustee's petition for restraining order and order to show cause, filed June 15, 1951.

6. Answer to receiver's petition to determine title to personal property and order to show cause, filed June 15, 1951.

7. Findings of fact and conclusions of law, filed July 10, 1951.

8. Order filed July 10, 1951.

9. Petition for review of referee's order quieting title, filed July 18, 1951.

10. Respondent's Exhibits 1, 2, 3, and 4.

11. Order of the above-entitled Court entered July 31, 1951.

12. Notice of appeal.

13. Clerk's certificate.

Dated October 18th, 1951.

HARRY R. ROBERTS, and

JESS G. SUTLIFF,

By /s/ JESS G. SUTLIFF,

Attorneys for Christine Allen.

[Endorsed]: Filed October 19, 1951.

No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of
Joseph E. Allen, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

DEC 29 1951

PAUL P. O'BRIEN
CLERK



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No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of
Joseph E. Allen, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Origin of the Appeal.

This is an appeal by Christine Allen, the former wife of the bankrupt, from an order of the District Court upon a petition for review affirming an order of the Referee adjudging that appellant has no right, title or interest in or to certain personal property and quieting title to the same in the Trustee. The facts are not in dispute and upon such a recognition by the Referee [Tr. pp. 6 to 7, "Evidence"], the order of the Referee was primarily predicated upon documentary evidence introduced into evidence as exhibits on behalf of the appellant in the proceedings before the Referee, which evidence consists of a property settlement agreement between the appellant and the bankrupt [Tr. pp. 49 to 62], an interlocutory decree of divorce in a divorce proceeding between appellant and

the bankrupt [Tr. pp. 63 to 64], a final decree of divorce in the divorce proceeding [Tr. pp. 65 to 66], and certain pleadings in an action commenced in the State court after the divorce proceedings for the enforcement of the terms of divorce decrees and of the property settlement agreement [Tr. pp. 67 to 86]. The appeal comes before this Court, as it did before the District Court, without a reporter's transcript.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt under section 4 of the Bankruptcy Act by the filing of his petition to be adjudged a voluntary bankrupt under the provisions of said Act.

The summary jurisdiction of the Referee to pass upon the claim of appellant to an undivided one half interest as a tenant in common with the bankrupt in the personal property employed in the conduct of the drugstore business was invoked by a finding by the Referee that the bankrupt was in possession of said property, and that upon the appointment and qualification of his Receiver in Bankruptcy herein, the bankrupt delivered possession of the same to the Receiver and that appellant at no time was in possession [Tr. pp. 34 to 35, Findings IV, V, and VI].

The jurisdiction of the District Court on review was invoked by appellant filing her "Petition for Review of Referee's Order Quieting Title" [Tr. pp. 41 to 47], under section 39-c of the Bankruptcy Act, directed toward the Referee's "Findings of Fact and Conclusions of Law Re: (1) Determination of Title to Personalty; (2) Restraining State Court Litigation" [Tr. pp. 31 to 41].

The jurisdiction of this, the Court of Appeals of the United States for the Ninth Circuit, was invoked by appellant under section 24-a of the Bankruptcy Act, by the filing on August 29, 1951, of her "Notice of Appeal" [Tr. p. 48], directed toward the "Order on Petition for Review" filed July 31, 1951 [Tr. pp. 47 to 48], which order affirmed the Referee's "Findings of Fact and Conclusions of Law Re: (1) Determination of Title to Personalty; (2) Restraining State Court Litigation" [Tr. pp. 31 to 41].

Statement of Facts.

Christine Allen and the bankrupt herein were married on December 31, 1933. During the continuance of their marriage these parties acquired a drug store business in the Town of Lone Pine, California, which business and assets thereof were community property. In 1949 unhappy differences had arisen between the parties and on June 8, 1949, they entered into a property settlement agreement [Tr. p. 49]. Thereafter and on June 9, 1949, an interlocutory decree of divorce was rendered in favor of the wife [Tr. p. 63]. Thereafter on June 26, 1950, the wife received a final decree of divorce [Tr. p. 65]. By the terms of both the interlocutory and final decrees the property settlement agreement was submitted to the Court, approved by the Court, and referred to in such decrees and each of the parties thereto was ordered by the Court to perform his or her respective obligations thereunder.

At the time of the entry of the interlocutory decree of divorce the assets of said drug store business consisted, and now consists, of an off-sale alcoholic beverage license issued to and in the name of the bankrupt, a stock in

trade of alcoholic beverages, a stock in trade of drugs, medicines and sundries, furniture, fixtures, accounts receivable and good will belonging to said business [Finding IX of Referee's Findings of Fact and Conclusions of Law—Tr. p. 36]. By the terms of the property settlement agreement the parties agreed that this drug store business and the assets thereto pertaining were community property and no question has ever been raised either in the divorce proceedings or in the proceedings before the Referee that the drug store business and the assets thereto pertaining had any character other than the community property of the parties immediately prior to the entry of the interlocutory decree.

At the time of the execution of the property settlement agreement both Christine Allen and her husband, the bankrupt herein, were represented by counsel and the property settlement agreement represents the result of the negotiations had between the parties and their respective counsel looking toward a division of the community property and the drug store business was the principal asset of the community. In substance the parties stipulated that the business was a community asset and that it should remain a community asset after the execution of the property settlement agreement and until the entry of an interlocutory decree of a court of competent jurisdiction in an action by and between the parties in which event, namely, the entry of an interlocutory decree, the business was to be owned by the parties as tenants in common, each owning an undivided one-half interest therein and the business was to remain thereafter under the active management of the husband.

There is no question presented in these proceedings as to whether this community property would be chargeable

with the debts contracted during the existence of the community up until the entry of the interlocutory decree. The Referee has found that with the exception of one creditor, namely, Lester A. Johnson, there are no creditors of the bankrupt in existence today whose debts arose prior to the execution of the property settlement agreement, and, as to this particular creditor, Christine Allen is obligated with the above named bankrupt by reason of their joint execution of the promissory note evidencing the debt to said creditor [Finding X—Tr. p. 36]. The bankrupt in operating the drug store business incurred obligations from time to time and has repaid some of said obligations from the receipts of the drug store business.

Prior to the filing of his individual voluntary petition to be adjudged a bankrupt, the bankrupt filed in the District Court a petition in the name of an alleged copartnership consisting of appellant and the bankrupt and praying that the said firm be adjudged a bankrupt. Appellant opposed said petition on the ground that she was not a partner. After a hearing, appellant's position was sustained and it was adjudged that no copartnership whatsoever existed between the bankrupt and appellant and the petition in the name of the alleged copartnership was dismissed [Tr. p. 37].

On May 17, 1951, the bankrupt filed his voluntary petition herein to be adjudged a bankrupt. Thereafter, on May 24, 1951, the respondent filed herein a petition entitled "Proceedings to Determine Title and Order to Show Cause" alleging in substance that no notice of intention to transfer was filed prior to the execution of the property settlement agreement or prior to the entry of the interlocutory decree and that by reason thereof appellant's claim to ownership of one-half of the assets of the busi-

ness was void as against creditors [Tr. pp. 8 to 12]. Appellant answered said petition, admitted that no notice of intention to transfer was ever filed, and alleged that none was necessary or required by law, set forth her title as a tenant in common with the bankrupt and her ownership of an undivided one-half interest in the assets and asserted several affirmative defenses consisting of a claim that the District Court had no jurisdiction in a summary proceeding over the subject matter or the person of appellant and that another action was pending between the bankrupt and appellant in the state court involving the issue, among others, of the partition of the assets of the business [Tr. pp. 12 to 16]. After a hearing the Referee made an order dismissing said petition without prejudice to further proceedings to determine appellant's title to the assets of the business [Tr. p. 31].

Thereafter, on June 12, 1951, Respondent filed another petition herein entitled "Petition to Determine Title to Personal Property and Order to Show Cause," alleging in substance that no notice of intention to transfer was filed prior to the execution of the property settlement agreement or prior to the entry of the interlocutory decree of divorce, and alleging, further, that by the terms of the property settlement agreement appellant appointed the bankrupt her agent for the purpose of managing, operating, and controlling the business and that in the course of that agency the bankrupt incurred his scheduled debts and alleging that by reason of said agency, appellant was estopped to assert any interest in the assets of

the business adverse to the bankrupt's creditors [Tr. pp. 17 to 20]. Appellant answered the petition by setting forth her claim of ownership to an undivided one-half interest as a tenant in common with the bankrupt to all of the personal property used in the business, admitted that no notice of intention to transfer was ever filed, but alleging that the property settlement agreement was recorded in December 1949 and again asserted that no such notice of intention was required by law, and denied the allegations of the petition that the bankrupt was the agent of appellant in incurring his scheduled debts and denied that she was estopped to claim her ownership of an interest in the assets, and affirmatively alleged that there was no jurisdiction of the Bankruptcy Court to pass upon her title [Tr. pp. 26 to 30]. After a hearing on this petition the Referee made his order, which is under review in this appeal, adjudging that appellant had no interest in the assets of the drugstore business and enjoining appellant from further prosecuting the state court action pending between appellant and the bankrupt for partition of the property [Tr. pp. 39 to 41]. This order was based upon consolidated findings of fact and conclusions of law in reference to the petitions of May 24, 1951 and June 12, 1951 [Tr. pp. 31 to 39]. In his consolidated conclusions of law, the Referee concluded in substance that: (a) The Bankruptcy Court had summary jurisdiction over the subject matter of the petitions to determine appellant's interest; (b) Under the property settlement agreement and after the entry of the interlocutory decree, appellant had merely an interest as a tenant in common in the net

worth of the business and not an interest in the assets thereof; (c) The transfer to appellant of an "interest as a tenant in common in the net worth of the said business" was void as against creditors of the bankrupt for the reason the transfer of said interest was not accompanied by an immediate delivery by the bankrupt to appellant of the assets of the business and was not followed by an actual and continued change of possession; and (d) The transfer of said interest was not void as against the Trustee by reason of the fact that no notice of intended transfer was filed.

Specifications of Error.

A. The District Court erred in holding that the interest acquired by appellant in the drugstore business was under the terms of the property settlement agreement, after the entry of the interlocutory decree, an interest as a tenant in common with the bankrupt in the net worth of the business and not an interest in the physical assets of the business.

B. The District Court erred in holding that the conversion of appellant's antecedent community property interest in the drugstore business to a tenancy in common interest with the bankrupt in the net worth of the business was a transfer void as against creditors of the bankrupt and holding that such a conversion was a transfer requiring an immediate delivery by the bankrupt to appellant of the assets of the business to be followed by an actual and continued change of possession.

ARGUMENT.

I.

The Property Settlement Agreement Did Not Itself Disturb, Modify, Convert or Otherwise Diminish or Augment the Property Rights of the Spouses in the Drugstore Business and the Business Remained After the Execution of the Agreement, as It Did Before, the Community Property of the Spouses.

No present transfer of any interest whatsoever was made by either of the spouses to the other by the execution of the property settlement agreement.

“The drugstore above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest. The drugstore shall remain under the active management and control of the husband. In the event that said drugstore is sold, there shall be paid to the wife the sum of fifteen thousand dollars (\$15,000.00) from the proceeds of such sale, in full satisfaction of her right, title and interest in and to the drugstore, and upon such sale the husband shall establish a trust fund in the amount of ten thousand dollars (\$10,000.00) for the use of said minor children at any time their needs may require it, but primarily for the purpose of obtaining a higher education for them . . .” [Tr. pp. 55 to 56, par. Fourteenth.]

Not only was the title to the business as the community property of the spouses left undisturbed by the execution of the property settlement agreement, but also its execution did not alter any of the legal incidents or attributes of property of this character. The possession and control

of the business remained in the husband after the execution of the agreement. The possession and control of community personal property is by law vested solely in the husband and his exclusive dominion over it is subject only to the limitation that he may not deal with it in fraud of the rights of the wife. In the case at bar the husband retained his possessory prerogative. We shall discuss more fully the community property character of the rights of the parties in this business at another point.

Section 3440 of the Civil Code operates only upon a technical transfer of title.

“Every transfer of personal property . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void . . .”

Civil Code, Sec. 3440.

Section 3440 of the Civil Code contains several important limitations and exceptions to its operation. The statute is one of technical operation and its proper application requires in many cases, as it does in this, a determination of the nature and origin of the transaction under consideration. Its liberal construction has not lead the courts to ignore its plain limitations or exceptions.

Since neither the quantum nor quality of the spouses' estate in the business as community property was changed in any degree by the terms of the property settlement agreement, and, since they thereby preserved to the business all of the legal incidents of this type of ownership, the execution *per se* of the agreement did not transfer any interest in the business from either spouse to the other.

II.

The Conversion of Appellant's Antecedent Community Property Interest to a Tenancy in Common Interest Was Not in Violation of Section 3440 of the Civil Code for the Reason That It Was a Transaction Falling Within One or Two of the Exceptions or Exemptions Contained in That Section.

A. The Conversion of Appellant's Community Interest to a Tenancy in Common Interest Was Made Under the Direction or Order of a Court of Competent Jurisdiction.

The interlocutory decree of divorce provided in part as follows:

"It is further ordered, adjudged and decreed that the property settlement and child custody agreement, an executed copy of which was filed with the Court on this date, be and the same is hereby approved in all respects, and each party thereto is hereby ordered and directed to meet and observe the obligations therein contained incumbent upon them respectively."

[Tr. p. 64.]

The final decree of divorce contained substantially the same provision [Tr. p. 66].

Section 3440 in general contains three mandatory provisions and five exceptions or exemptions to these mandatory provisions. In its mandatory aspects, the statute applies to only three situations: (1) Requires every transfer of personal property to be accompanied by immediate delivery, followed by an actual and continued change of possession; (2) Provides for a special method of transfer for wines in their containers; and (3) Requires the recordation and publication of a notice of intention to transfer the stock in trade or fixtures of a merchant. To all

of these general requirements the statute expressly provides a number of exceptions or exemptions to its operation which may be summarized as: (1) Transfers made under direction or order of court of stock in trade or fixtures of a merchant; (2) Transfers by any person in discharge of official duty; (3) Transfers by any person in discharge of any trust imposed by law; (4) Transfers to or by an assignee for the benefit of creditors; and (5) Transfers of exempt property. Of these exceptions those applicable to the case at bar are exceptions numbered (1) and (3).

“ . . . provided further, that the provisions of this section shall not apply or extend to any sale, transfer, or assignment of a stock in trade nor to any sale, transfer, assignment or mortgage of the fixtures, or store equipment, of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer or retail or wholesale merchant made under the direction or order of a court of competent jurisdiction or by an executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law”

Civ. Code, Sec. 3440.

The exemption in favor of judicial transfers was added in 1903 to the end of section 3440 as it then stood. This amendment was necessary because the decided cases had left the point in some doubt and a case decided shortly before the amendment had created some confusion. In an early case the Supreme Court had declined to pass upon the applicability of the Statute of Frauds to judicial sales (*O'Brien v. Chamberlain* (1875), 50 Cal. 285, 289).

Later, the Supreme Court held that where a judgment creditor purchased at execution sale and permitted the judgment debtor to retain possession, such a lack of delivery and change of possession might be relied upon as showing an element of actual fraud to avoid the sale (*Davis v. Drew* (1881), 58 Cal. 152, 158). In a case decided shortly before the 1903 amendment, the Supreme Court held that where a stranger purchased at execution sale and permitted the judgment debtor to retain possession, such a lack of delivery and change of possession did not *per se* invalidate the purchaser's title although such a showing might be relied upon as an element of actual fraud (*Matteucci v. Whelan* (1899), 123 Cal. 312, 55 Pac. 990). Thus the state of the law at the time of the amendment was that the rule was different where a stranger purchased at the sale from the situation where the judgment creditor bid the property in, and in both instances the judgment debtor's retention of possession was to be considered as an element of actual fraud. In adopting this amendment the Legislature adopted the English rule of complete immunity for judicial transfers.

In 1903 section 3440 was substantially revised by the Legislature. The section was completely repealed. The old text of the section was reenacted. However, the Legislature added two new provisions to the old text, namely, the provisions relating to bulk sales and the provisions relating to the exceptions or exemptions to the operation of the statute. The section as it was recast in 1903 concluded with the provisions relating to the exceptions or exemptions.

It is of paramount importance to note that the 1903 amendment provided a *complete*, and not a partial, immunity of judicial transfers from the provisions of section

3440. The exemption provisions were added at the *end* of the section and were directed to all of the antecedent provisions of the section. The 1903 provisions commenced as follows: “provided further, that the provisions of this section shall not apply . . .” (*Italics added.*)

The text of the 1903 amendment, adding the exemption provision, is susceptible to no other construction than that the provision in reference to judicial sales dispensed with compliance with the requirement of immediate delivery and a change of possession for such sales.

The exemption provision in reference to judicial transfers is not directed solely to notices of intended sale. Where a stock in trade and fixtures of merchant are the subject of a judicial sale, the provision dispenses with not only the requirement of the recordation and publication of a notice of intended transfer, but also of the requirement of an immediate delivery and a change of possession. This is the only construction, we submit, which can be placed upon the exemption provisions in view of the cases leading up to its adoption. These cases were all decided at a time when there was no bulk sale provision in the section and involved the claim of subsequent attaching creditors, that a prior execution sale was void because the purchaser at the prior sale, permitted the debtor to retain possession without affecting an immediate delivery, followed by an actual and continued change of possession.

The referee, in his conclusions of law [Tr. p. 38, par. II], ignored the plain language of section 3440 exempting judicial sales from *all* of the provisions of the section and concluded that there was a requirement for immediate delivery and change of possession at the time of the entry of the Interlocutory Decree of Divorce.

Counsel for appellant have been unable to find any cases decided since 1903 construing the exemption provision contained in section 3440 in reference to transfers made at the direction or order of court. The broad and clear language of the provision is, we submit, the reason for this lack of later decision.

B. The Conversion of Appellant's Community Interest to a Tenancy in Common Interest Was in Discharge of a Trust Imposed by Law Upon the Bankrupt.

1. The statute specifically exempts from its operation transfers by any person “. . . in the discharge of any trust imposed upon him by law”

Civil Code, Sec. 3440.

2. In the management and disposition of community personal property a trust is imposed by operation of law upon the husband in favor of the wife and in such dealings the husband is held accountable for the discharge of obligations imposed by law upon fiduciaries.

Fields v. Michael (1949), 91 Cal. App. 2d 443, 205 P. 2d 402.

“The position of the husband, in whom the management and control of the entire community estate is vested by statute (Civil Code, sections 161a, 172, 172a), has been frequently analogized to that of a partner, agent, or fiduciary.” (Citing many cases.)

Fields v. Michael, supra, p. 447.

3. Any contract or transaction between husband and wife is governed by the rules governing persons occupying confidential relations as defined by the title on “trusts” contained in the Civil Code.

Civil Code, Sec. 158.

III.

Even if the Property Settlement Agreement Did by Its Terms Transfer to Appellant an Interest in the Assets of the Business, and Even if the Interlocutory and Final Decrees of Divorce Did Not Transfer Any Such Interest to Appellant, Which We Do Not Concede, the Conversion of Appellant's Antecedent Community Interest to a Tenancy in Common Ownership With the Bankrupt Was Within Several Well Recognized Exceptions to the Statute of Fraudulent Transfers.

Appellant contends that the bankrupt was not required to make any immediate delivery of any of the assets of the business to her at any time for the reason that the conversion of her antecedent community property interest to a tenancy in common interest was outside the operation of the Statute of Fraudulent Transfers. She has earlier discussed in this brief the applicability to this conversion of interest of the exceptions contained in the statute in reference to transfers at the direction or order of court and transfer in discharge of a trust imposed law. Assuming for the purposes of the argument only that neither of these statutory exceptions apply to this conversion of interest, appellant advances three principal contentions: (1) That since appellant was not in actual physical possession of the property at any time, no immediate delivery on her part was required to pass a title to the bankrupt, valid as against her creditors, and that since she could pass to him all of her title in the community property without any delivery whatsoever, she could pass to him less than all of her title; (2) That the interest appellant received for the interest which she validly transferred to the bankrupt is valid as against his creditors since her correspond-

ing interest was acquired contemporaneously with and was of the same quantum and quality as the interest validly acquired by the bankrupt; and (3) That since the bankrupt was at all times in possession of the property, no delivery whatsoever was required for any transfer from appellant to the bankrupt for the reason that a transfer to a vendee in possession is outside the scope of the statute; and no delivery by the bankrupt to appellant was required for the further reason that the statute does not require idle acts or absurd formalities, and its application to this case would require the bankrupt to put himself out of possession to acquire a legal possession and to forego the exercise of the right to possession of the property which was an incident of his ownership as a tenant in common.

Unless the conversion of appellant's antecedent community property interest to a separate interest as a tenant in common in the business violated the Statute of Fraudulent Transfers or some strong public policy, there would appear to be no reason why her interest in the business should not be recognized by the trustee. With a single exception, all of the bankrupt's debts were incurred after the entry of the interlocutory decree [Tr. p. 36]. However, the exact nature of appellant's antecedent interest in the business is important to a consideration of additional exceptions to the operation of the Statute of Fraudulent Transfers. Before considering these exceptions we shall comment upon a few of the legal attributes of appellant's antecedent community interest in the business.

A. Appellant Had a Present, Existing and Equal Interest in the Business Prior to, at the Time of, and Subsequent to the Execution of the Property Settlement Agreement.

1. The property settlement agreement recognized the community nature of the business.

“Eleventh: The parties hereto are the owners of the following described community property:

“1. That certain drugstore business conducted in the Town of Lone Pine, County of Inyo, State of California, commonly known as Jerry’s Mt. Whitney Drugstore; * * *” [Tr. pp. 53 and 54.]

The Referee’s findings of fact recognized the antecedent community nature of the business [Tr. p. 33].

2. Appellant’s ownership interest in the business was coordinate with that of the bankrupt at the time of the execution of the property settlement agreement.

“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property.”

Civil Code, Sec. 161a.

The statutes in effect at the time of the acquisition of property determines its community character and the quantum and quality of the spouses respective interests therein.

Strong v. Strong (1943), 22 Cal. 2d 540, 140 P. 2d 386.

Since the enactment of section 161a of the Civil Code in 1927, the wife has a vested interest in one-half of the earnings of the husband and the accumulated proceeds thereof.

Wessner v. Wessner (1949), 89 Cal. App. 2d 759, 764, 201 P. 2d 837;

Cooke v. Cooke (1944), 65 Cal. App. 2d 260, 266, 150 P. 2d 514.

During the existence of the marriage the wife's interest in the community property is recognized as separate from that of the husband requiring its separate treatment under the revenue laws:

United States v. Malcolm (1931), 282 U. S. 792, 51 S. Ct. 183, 75 L. Ed. 714;

Boland v. Comr. Int. Rev. (1941), 118 F. 2d 662;

Comr. of Int. Rev. v. Cavanagh (1941), 125 F. 2d 366;

O'Bryan v. Comr. of Int. Rev. (1945), 148 F. 2d 456.

3. So long as the business was community property of appellant and the bankrupt, the management, control and right to the possession of its assets was vested in the bankrupt by operation of law.

"The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; . . ."

Civil Code, Sec. 172.

This absolute right of the husband to the management and control of community personal property is subject only to the limitation that the husband may not make a gift of the wife's interest without her consent.

Civil Code, Sec. 172.

The corollary to rule of the exclusive possessory prerogative of the husband to community personal property, is that the wife has no right to the possession of such property and that her consent to the husband's exercise of his possessory prerogative adds nothing to his rights.

Cox v. Kaufman (1946), 77 Cal. App. 2d 449, 175 P. 2d 260;

Sampson v. Welch (1938), 23 Fed. Supp. 271.

The Referee in his findings found that the business was community property prior to and at the time of the execution of the property settlement agreement [Tr. p. 33]. His finding that appellant did not have possession of the business and did not manage it at any time before the entry of the interlocutory decree [Tr. p. 35] and his finding that the bankrupt managed and had possession of the business prior to the entry of the interlocutory decree [Tr. pp. 34 to 35] only confirm his finding of its antecedent community character.

By law appellant was under a disability to make any delivery of the assets of the business or of her interest therein to her husband either prior to the execution of the property settlement agreement or subsequent thereto and before the entry of an interlocutory decree. The

agreement preservd the community character of the business for an indefinite time. To require appellant to have made an immediate delivery of that which she did not in fact possess and that which she could not in law control, would be to construe one section to override another section of the same code. The requirement of the doing of an illegal act is not the mandate of any statute. We shall later consider whether there was any requirement for the making of an immediate delivery at the time of the entry of the interlocutory decree; however, until the entry of such a decree, no omission on the part of appellant or the bankrupt to make an immediate delivery could prejudice the rights of either. Moreover, until then, the possession of the bankrupt was, in the contemplation of the law, the possession of appellant as his wife.

4. Property settlement agreements are favored by the law.

“The agreement in evidence made a division or adjustment of the respective rights of the parties in both community and separate property. It is especially authorized by section 159 of the Civil Code. When such agreements are not procured through fraud, undue influence, or coercion, they are highly favored in the law. (*Hensley v. Hensley*, 179 Cal. 284, 287/183 Pac. 445/.)”

Makzoume v. Makzoume (1942), 50 Cal. App. 2d 229, 230, 123 P. 2d 72.

B. The Statute of Fraudulent Transfers Has No Application to a Transfer of Property Not in the Possession or Control of the Transferor.

The order of the Referee adjudging that appellant has no interest in the assets of the business [Tr. p. 40, par. III] is predicated upon his conclusion of law that the *bankrupt* failed to make an immediate delivery of the assets of the business to appellant [Tr. p. 38, par. II]. Just when, in reference to the execution of the property settlement agreement and the entry of the interlocutory and final decrees of divorce, the Referee considered such a delivery and change of possession to have been required by the Statute of Fraudulent Transfers, is not clear from his findings and conclusions. However, the Referee did not conclude that appellant's interest failed because she failed to make an immediate delivery of the assets to the bankrupt. Had the Referee considered that appellant was required to make an immediate delivery to the bankrupt, the conversion of her antecedent community interest to a tenancy in common interest would have been void as against her creditors.

Analytically it is difficult to determine exactly what interest was transferred by either appellant or the bankrupt to the other by the conversion of their community property to a tenancy in common ownership. After the conversion the quantum of their respective interests remained as before, each owning an undivided equal interest. Except for the right to freely alienate her interest without the consent of the bankrupt, the only other new right acquired by appellant by the conversion was the right to the possession of the property equally with the bankrupt. The bankrupt by the conversion acquired no new right to the possession of the property.

If the bankrupt did acquire an interest as a tenant in common with appellant in the property valid as against appellant's creditors, we believe that the corresponding interest acquired by appellant therein, *contemporaneously* with and of the same quantum and quality as the interest validly acquired by the bankrupt, should also be valid as against the creditors of the bankrupt. Whatever appellant received for that which she validly transferred must be valid.

1. The Statute of Fraudulent Transfers is applicable only to transfers where the transferor is in possession.

“Every transfer of personal property . . . is conclusively presumed if made by a person *having at the time the possession or control of the property*, and not accompanied by an immediate delivery . . . to be fraudulent, and therefore void, against those who are his creditors *while he remains in possession*. . . .” (Sec. 3440, Civil Code; Italics added.)

“Where the vendor is not in possession of the property or it is not under his control, a sale thereof is not within the rule requiring immediate change of possession”

12 Cal. Jur. 1004-5.

2. The rule that the Statute of Fraudulent Transfers has no application to transfers made at a time when the transferor does not have possession is predicated upon the limitation imposed by the language of Section 3440 making it applicable only to transfers “. . . made by a person

having at the time the possession or control of the property”

Cosby v. Cline (1921), 186 Cal. 698, 701, 200 Pac. 801;

Curtner v. Lyndon (1900), 128 Cal. 35, 37, 60 Pac. 462;

Anglo-California Nat. Bank v. Rasmussen (1935), 6 Cal. App. 2d 337, 339, 44 P. 2d 407.

3. Where a tenant in common who is out of possession transfers his interest to a third person, no delivery is necessary and the continued retention of possession by the cotenant in possession does not render the transfer void as against creditors of the transferor.

Yank v. Bordeaux (1899), 23 Mont. 205, 58 Pac. 42.

See:

Brown v. O'Neal (1892), 95 Cal. 262, 266, 30 Pac. 538.

“At the time of the transfer they were not in possession or control of the ore, but their co-owners were then lawfully in the actual possession and control of the common property, and so remained until it was sent to the smelter for milling and reduction. Under such circumstances, a sale by a tenant in common may not be avoided by creditors on the ground that the chattel was not delivered to the purchaser, for, as Mr. Freeman expresses the rule of law”

Yank v. Bordeaux, supra, p. 44.

The rule of *Yank v. Bordeaux*, *supra*, would appear to be the law of California. The case was decided under a statute (Montana Civil Code, Sec. 4491) patterned after Section 3440 of the California Civil Code. The case was decided upon the same authorities and by the same reasoning as were used in the opinion of *Brown v. O'Neal*, *supra*, and the California case was cited as authority.

C. The Statute of Fraudulent Transfers Has No Application to a Transfer of Property Already in the Possession of the Transferee.

1. Where an agent has possession of personal property at the time the agent acquires title there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Hogan v. Cowell (1887), 73 Cal. 211, 14 Pac. 780;
Ellis v. Funk (1916), 32 Cal. App. 426, 429, 163
Pac. 332;

Gray v. Little (1929), 97 Cal. App. 442, 449, 275
Pac. 870.

2. Where a mere bailee in possession acquires the title of the bailor there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Banning v. Marleau (1894), 101 Cal. 238, 241,
35 Pac. 772.

3. Where one tenant in common in possession acquires the interest of his cotenant there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Visher v. Webster (1859), 13 Cal. 58, 61.

However, where a tenant in common who has possession transfers his entire interest to a third person, the transfer must be accompanied by an immediate delivery and followed by an actual and continued change of possession.

Brown v. O'Neal (1892), 95 Cal. 262, 266, 30 Pac. 538;

Haster v. Blair (1940), 41 Cal. App. 2d 896, 899, 107 P. 2d 933.

“In other words, where the tenant in common is in possession of the property, and he transfers his interest to another without a transfer of possession, section 3440 of the Civil Code may be invoked to protect a creditor of that other, and the property may be seized in the same manner as though there had been no attempted transfer.”

Haster v. Blair, supra, p. 899.

4. The rule that no immediate delivery is required where the transferee is already in possession is founded upon necessity and the avoidance of absurd or idle acts.

“It can hardly be contended that the respondent should have driven the horses away from both his ranchos. That would be almost the equivalent of saying that he should have put himself out of the actual possession in order to have kept himself within the legal possession.”

Hogan v. Cowell, supra, p. 213.

“It is axiomatic that the law does not require the doing of an absurdity; so if the purchaser is already in possession of the property as the vendee or agent of the vendor, no further delivery is needed or can be made when he purchases the property. Otherwise the purchaser would be compelled to put himself out of actual possession in order to acquire a legal possession”

12 Cal. Jur. 1004.

“The exceptions to the rule requiring a change of possession to accompany an absolute sale to free it from the imputation of fraud, arising from the character and situation of the property, will be considered together. They both rest on the same ground, namely, the absurdity of requiring that which is impossible or highly impractical;”

Freeman on Executions, 3rd Ed., Sec. 153, p. 724.

“If the bailee himself becomes the purchaser of the property, it is manifest that there cannot be any visible change of possession, and hence, none is required. He may continue in possession as before.”

Freeman on Executions, *supra*, p. 733.

“The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. If the cotenant selling is in the sole possession, he ought to give possession to his vendee; but if the other cotenants are in possession the vendor has no right to take it from them. He

may, therefore, from necessity make a valid sale without placing the property in the custody of his vendee.”

Freeman on Executions, *supra*, p. 734.

5. A delivery of the assets of the business by the bankrupt to appellant at any time after the bankrupt acquired an interest as a tenant in common in those assets would have been an act in derogation of his title as a tenant in common.

Each tenant in common is entitled to possess and use the whole property, the possession of one being in contemplation of law the possession of all the co-owners, and none of the co-owners is entitled to a possession which excludes for *any period of time* a like possession of his co-owners.

Krum v. Malloy (1943), 22 Cal. 2d 132, 135, 137 P. 2d 18;

Johns v. Scobie (1939), 12 Cal. 2d 618, 623, 86 P. 2d 820, 121 A. L. R. 1404.

The principle that each tenant in common is entitled to the possession of the common property for every instant of time during which the cotenancy exists has been held applicable to cotenancies in personal property.

Krum v. Malloy, supra.

“Tenants in common are seized *per my* and not *per tout*, and are entitled to the possession of the whole. This must be so because no one of them can certainly state which part of the property is his own;

and further, a tenant in common is not *seised per my et per tout*, for such a tenure would make him a joint tenant. Tenants in common, hold the common land by unity of possession, and each of them has the right to enter upon and occupy the whole and every part thereof. This being so, such a tenant has no right to exclude his cotenant from any portion of the common lands. So a tenant in common of an undivided portion of the property is entitled to the possession of the whole thereof as against all persons except his cotenants.”

7 Cal. Jur. 345-6.

“It is an established principle of law that a tenant in common cannot maintain an action against his cotenant for the recovery of the common property or even for his undivided interest therein, for each tenant in common has an equal right to the possession of the whole.”

7 Cal. Jur. 365.

Appellant's position can be succinctly stated: any required delivery of the property by the bankrupt to appellant while the property was community would have been in derogation of the bankrupt's community title, and after the conversion of the ownership to a tenancy in common, such a required delivery would have been in derogation of the bankrupt's title as a tenant in common.

IV.

**Appellant's Interest Was in the Assets of the Business
and Not in the Net Worth Thereof.**

1. The order of the Referee is inconsistent with the conclusions of law. The order adjudges that Christine Allen has no interest in the assets of the business. The conclusions of law purport to construe the property settlement agreement, as awarding her as a tenant in common in the *net worth* of the business.

2. The conclusions of law insofar as they purport to construe the agreement as awarding Christine Allen an interest as a tenant in common in the net worth of the business and not in the assets thereof, is an unwarranted construction of a plain and unambiguous agreement. The term "net worth" is not used expressly or by implication in the agreement and, indeed, the term has been imported into the conclusions of law in violence to the express provisions of the agreement.

3. By the express terms of the property settlement agreement, it was provided that upon the entry of an interlocutory decree of divorce the business shall be owned by the parties as tenants in common, each owning an undivided one-half interest.

"The drug store above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest." [Tr. p. 55.]

4. Christine Allen's interest in the business is that of a tenant in common in the assets of the business and not in the net worth of the business for the following reasons:

a. Paragraph "Fourteenth" of the property settlement agreement uses language of ownership of property rather than the language of a right *in personam* against her husband to share in the net worth of the business. Attention of the court is drawn to the fact that the provision is couched in the terms of ownership of physical assets. The term "drug store" is used in the first three sentences of Paragraph Fourteenth and is obviously used in each of these sentences in the same sense, namely, the physical assets of the business. In the second sentence the term could have no meaning other than that the physical assets of the business were to remain under the active management of the husband. The third sentence uses the term in connection with the eventual sale of the business and here again physical assets are clearly indicated. There is no reason why this term when used in the first sentence, has any different meaning. The term "drug store" is equivalent to the term "business," and like the term "grocery store," "machine shops," "bakery" and like enterprises is an expression signifying the totality of assets devoted to the operation of the enterprise.

b. The term "net worth" is not found anywhere in the agreement or the decree.

c. The conclusion of the Referee that Christine Allen owns an undivided one-half interest in the net worth of the business ignores the provisions of Paragraph "First" of the agreement that each party

thereto is “*released and absolved from any and all obligations and liabilities for the future acts and duties of the other . . .*” and that each releases the other from all debts incurred by the other after the date thereof. If Christine Allen’s interest was in the “net worth” only, of the business, she would not be protected in the terms of this paragraph.

d. By the terms of Paragraph “Third” of the property settlement agreement, Christine Allen was given the immediate right to dispose of any property set over to her by the terms of the agreement and by the terms of Paragraph “Second” the property which she received by the terms of the agreement was her sole and separate property. Moreover, by Paragraph “Sixth” the parties agree to execute documents to make the real and personal property of the parties reflect the “record ownership” as in the agreement provided.

e. The property settlement agreement provided that Christine Allen was to receive \$15,000.00 from the sale of the drug store in the event it was sold in satisfaction of her “right, title and interest in and to the drug store.” If her interest were in the “net worth” this provision would be nugatory and unintelligible.

f. Partners have merely an interest in the net worth of a business and their ownership as tenants in partnership of the business is an ownership subject to the payment of firm debts. The Referee has found that no partnership exists between the bankrupt and Christine Allen, yet, in holding her interest to be in the “net worth” only, she is treated in effect, a partner.

g. By the terms of the property settlement agreement, in the event the drug store was sold, \$15,000.00 was to be paid to appellant from the proceeds of such sale in full satisfaction of her right, title, and interest therein [Tr. pp. 55 to 56]. Unless sooner sold, the husband was to purchase "the interest of said wife in said business" on or before December 15, 1951, either for cash or upon the payment of \$5,000.00 down and the balance in monthly installments [Tr. pp. 56 to 57]. The business was never sold and the bankrupt never took steps to purchase the wife's interest in the same, and there are no findings to that effect. However, the agreement recognizes that the wife was to have an interest in the assets of the business until such time as the husband (bankrupt) paid her \$5,000.00 down.

"Upon the payment of the initial deposit, the husband shall receive from the wife a bill of sale to said business, and shall execute and deliver to her a chattel mortgage on all of the trade fixtures, and equipment of said business, a first lien, as security for the establishment of the trust fund." [Tr. p. 57.]

h. If Christine Allen's interest were an interest in the "net worth" and not in the assets, the provision that her husband would on or before December 15, 1951, purchase her interest unless sooner sold, by the payment to her of \$15,000.00 in accordance with the provisions of Paragraph Fourteenth, would receive a strained and unnatural construction in that no one could predict what the net worth of any business would be two and one-half years in advance and make commitments in respect thereto.

V.

A Tenant in Common Is Not Liable for the Debts Incurred by a Cotenant in the Operation of the Cotenancy Property in the Absence of Authority Given to the Cotenant to Incur Such Obligations and Mere Silence of the Tenant With Knowledge of the Cotenant's Operation Does Not Constitute Such Authority.

It is the contention of appellant that the property settlement agreement and the decrees of divorce must be construed in the light of the decisions holding that a tenant in common is not liable for the debts incurred by a cotenant in the operation of cotenancy property in the absence of authority given to the cotenant to incur such obligations. There is no finding in this case that appellant ever authorized the bankrupt to incur any debts in the operation of the business and the property settlement agreement clearly denies the bankrupt's authority to incur any such debts.

1. Tenancy in common can exist in personalty.

Krum v. Malloy (1943), 22 Cal. 2d 132, 137 P. 2d 18;

Higgins v. Eva (1928), 204 Cal. 231, 239, 267 Pac. 1081.

2. A tenant in common has no power to bind any of his cotenants by contract and no action of one of them can impair the rights of the others.

Brown v. Oxtoby (1941), 45 Cal. App. 2d 702, 709, 114 P. 2d 622;

Most v. Passman (1937), 21 Cal. App. 2d 729, 731, 70 P. 2d 271;

7 California Jurisprudence 358.

3. A tenant in common is not liable for the debts incurred by a cotenant in the operation of the common property in the absence of express authorization.

Higgins v. Eva (1928), 204 Cal. 231, 239, 267 Pac. 1081.

4. Silence and knowledge are not the equivalent of authorization.

Higgins v. Eva, supra, p. 240.

5. In the operation of common property, one tenant invests his own money at his own peril and at his own risk, and if the venture results in a loss he cannot call upon his cotenants for contribution or reimbursement.

Higgins v. Eva, supra, pp. 240-241;

7 California Jurisprudence 350.

6. Where the buyer buys personal property and attaches it to or incorporates it in a larger mass, and where the buyer by contract has agreed with the owner of the larger mass that the title to such additions is to pass to the owner of the larger mass upon such attachment or incorporation, the contract is valid under Section 3440 and the owner of the larger mass acquires title to the addition, in the absence of an equitable estoppel running against him.

Dersch v. Thomas (1934), 138 Cal. App. 785, 30 P. 2d 630.

VI.

There Is No Finding That Any Creditor of the Bankrupt Suffered Any Prejudice or Was Misled by Either the Execution of the Property Settlement Agreement or the Entry of the Interlocutory or Final Decrees of Divorce.

The property settlement agreement was based upon a fair consideration running from one to the other. Its execution is wholly free from actual fraud. There is no finding that by its execution or by reason of the subsequent decrees, any creditor was misled or suffered prejudice. There is no finding to bring the case within any of the provisions of the Uniform Fraudulent Conveyance Act (Secs. 3439.04 to 3439.06, Civ. Code).

Conclusion.

It is the contention of Appellant that the order on Petition for Review given and entered by the lower court on July 31, 1951, which affirmed the order given and entered on July 10, 1951, by Referee Brink, be reversed, and that it be held:

1. That appellant acquired, and is the owner, under the terms of the property settlement agreement and the Interlocutory Decree, of an undivided one-half interest, as tenant in common, with the bankrupt, of the assets of the business known as "Jerry's Drugstore," free and clear of all creditors' claims against bankrupt.

2. That the transfer of Appellant's community property interest in the drugstore business, as tenant in com-

mon with the bankrupt in said business and the assets thereof, was not a void transfer as against creditors or the Trustee in Bankruptcy.

Respectfully submitted,

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Attorneys for Appellant.

No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of
Joseph E. Allen, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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FILED

JAN 25 1952

PAUL P. O'BRIEN



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Joseph E. Allen, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Basis of Jurisdiction.

This proceeding arose out of and from a voluntary petition in bankruptcy filed in the Southern District of California, Central Division (Bankruptcy Act, Sec. 2(7)). The Bankrupt had an estate in and was in possession—on the date of filing his petition—of the personal property, title to which is claimed by Appellant. The Referee in Bankruptcy (Bankruptcy Act, Secs. 22(a) and 38(3)) found that the Bankrupt was in fact in possession of said personal property upon the date of filing his petition in

bankruptcy and made his Order quieting title to said property in the Trustee in Bankruptcy, Respondent herein (Bankruptcy Act, Sec. (70)). From this Order Appellant filed a petition for review (Bankruptcy Act, Sec. 39(c)) by a judge. The District Court, having affirmed the Referee's Order, the Appellant has now filed an appeal before this Honorable Court (Bankruptcy Act, Sec. 24(a)(b)).

Statement of Facts.

The statement of facts as set forth by Appellant is substantially correct except that the Property Settlement Agreement entered into between the Bankrupt and Appellant referred only to a "drugstore business"; there was no reference whatsoever to "any assets pertaining thereto" as alleged by Appellant in her opening brief (p. 4, first par., line 7).

After the entry of the Order on July 10, 1951, Appellee, by Order of Court, liquidated the assets and now holds in his possession the proceeds therefrom.

ARGUMENT.

I.

No Sale, Transfer or Hypothecation of Personal Property Made by a Person in Possession Is Valid Against Creditors of Said Person Unless It Is Accompanied by Immediate Delivery and Followed by an Actual and Continued Change of Possession, or Unless Said Sale, Transfer or Hypothecation Falls Within the Express Statutory Exemption Contained in California Civil Code, Section 3440.

A. The laws of the State of California provide for the sale or transfer of tangible personal property to be made in accordance with special statutory provisions. The statute specifically covering such transactions is contained in the California Civil Code, Section 3440. This section provides, among other things, that:

“Every transfer of personal property other than a thing in action . . . is *conclusively* presumed as made by a person having at the time the possession or control of the property, and *not accompanied by an immediate delivery, and followed by an actual and continued change of possession* of the thing transferred, to be fraudulent and, therefore, void against those who are his creditors, while he remains in possession” (Emphasis added.)

This code section contains certain specific exemptions from the provisions of this requirement. It is clear, therefore, that since Bankrupt had full possession and

control of the property, to-wit: The drugstore business involved in these proceedings, and continued to retain complete possession and control after the purported transfer to Appellant, that unless the circumstances of this case warrant that it be included in one of the specific exemptions, the transfer must be conclusively presumed to be void against creditors (and, *ipso facto*, Appellee (Bankruptcy Act., Sec. 70c)) for failure to comply with the provisions of Civil Code, Section 3440.

B. California Civil Code, Section 3440 exempts sales, transfers or assignments of a stock-in-trade, or of fixtures of a retail merchant which are made under any of the following three cases:

(1) Under the direction or order of a Court of competent jurisdiction;

(2) By an executor, administrator, guardian, receiver or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law;

(3) Any assignment made for the benefit of creditors or by any assignee acting under such assignment.

This purported transfer of property between Bankrupt and Appellant pursuant to their Property Settlement Agreement, if at all, would be contended to fall within subdivision (1) hereinabove. However, the division of property, being by the private contract between Bankrupt and Appellant (*Hill v. Hill*, 23 Cal. 2d 82, 142 P. 2d 417) did not constitute an order by direction of Court, or judicial sale in any sense.

II.

The Property Settlement Entered Into Between the Bankrupt and Appellant Being a Private Contract Between the Parties Altering Their Property Rights, Did Not Constitute an Order or Sale Under the Direction of a Court of Competent Jurisdiction.

A. The Law Approves and Encourages and Upholds Contracts Between Husband and Wife.

1. The law of California is replete with cases that a husband and wife may contract with each other with respect to property rights (Civ. Code, Secs. 158 and 159; *Hough v. Hough*, 26 Cal. 2d 605, 160 P. 2d 15; *Howarth v. Howarth*, 183 P. 2d 670), and a husband and wife having agreed to an immediate separation or having actually separated, may enter into contracts adjusting their property rights (*Hill v. Hill*, *supra*), and such property settlement agreement between husband and wife is valid and binding on the Court where it is not tainted by fraud or compulsion, or is not in violation of the confidential relationship of the parties (*Adams v. Adams*, 29 Cal. 621, 177 P. 2d 265; *Norriss v. Norriss*, 50 Cal. App. 2d 726, 123 P. 2d 847; *Kelly v. Kelly*, 129 Cal. App. 325, 18 P. 2d 781; *Baxter v. Baxter*, 3 Cal. App. 2d 676, 40 P. 2d 536; *Robinson v. Robinson*, 94 Cal. App. 2d 802, 211 P. 2d 587). In this case, no claim is asserted that the contract was obtained through fraud or compulsion.

2. In entering property settlement agreements or any other agreements, the husband and wife may change the character of their property. It may be changed from separate to community (*Kenney v. Kenney*, 220 Cal. 134, 31 P. 2d 398); from community to separate (*Thomas*

v. Hoffman, 122 Cal. App. 213, 9 P. 2d 538), and such agreement will transmute their property from one status to another and need not be executed with any particular formality (*Estate of Watkins*, 16 Cal. 2d 793, 108 P. 2d 417; *Siberell v. Siberell*, 214 Cal. 767, 7 P. 2d 1003). And when spouses honestly agree to the disposition of their joint or community property, such disposition is final without regard to whether it is approved by the Court in divorce proceedings. *Such approval is not essential to its efficacy* (*Miranda v. Miranda*, 81 Cal. App. 2d 61, 183 P. 2d 61).

3. In the case before this Court, the Bankrupt and Appellant entered into a Property Settlement Agreement on June 8, 1949, clearly in contemplation of their separation and procurement of a divorce decree, for on the next succeeding day, June 9, 1949, an interlocutory decree of divorce was entered. In the Property Settlement Agreement between Bankrupt and Appellant, Bankrupt and Appellant said in effect:

“We now own a drugstore as community property and we will continue to own that drugstore as community property but, in the event of a certain happening, to-wit, an interlocutory decree of divorce being granted to either party, then this division and this change in character will become effective and we will own the drugstore as tenants in common.”

In other words, the division of property was made by the agreement itself, but the time for the *effective operation* of said division was the entry of an interlocutory decree. Since there was no allegation, no evidence offered or presented of fraud in the execution of this

Property Settlement Agreement, and since the said Agreement was an honest attempt by Bankrupt and Appellant to divide their property interests, it was a valid agreement and all such are binding on the Court (*Adams v. Adams, supra*).

B. This Property Settlement Agreement Entered Into Between Bankrupt and Appellant Was a Private Contract Between Parties, Was Not Merged With the Divorce Decree, and the Alteration of Property Rights Was Not by Order of Court.

1. All the transfer of property and, specifically, the transmutation of the character of ownership from community to tenancy in common of the drugstore in question, was made by the terms of the Property Settlement Agreement. The decree merely *approved* the Property Settlement Agreement which was not incorporated into the decree. The elements necessary for merger were lacking. If a property settlement agreement is complete in itself and is merely *referred* to in a divorce decree or approved by the Court but not *actually made a part* of the decree, the provisions of such agreement cannot be enforced by contempt proceedings (*Lazar v. Superior Court*, 16 Cal. 2d 617, 107 P. 2d 249). It is necessary that there be an actual *incorporation* of the agreement in the decree in order that the decree standing alone may give within itself the complete measure of the rights and obligations of the parties (*Price v. Price*, 85 Cal. App. 2d 732, 194 P. 2d 101). The very important and leading case of *Hough v. Hough*, 26 Cal. 2d 605, 106 P. 2d 15, holds that the part of the decree which is actually incorporated in the decree (in other words, set forth *haec verba*) is merged in the decree.

2a. The question of merger is not in issue here, nor is it essential to the matter before the Court in these proceedings, for the reason that merger is a question only when prospective matters are sought to be determined by the parties to the agreement or decree. As for example, when enforcement by contempt proceedings is desired (*Lazar v. Superior Court, supra*; *Price v. Price, supra*); or when modification of the terms for payment of alimony (*Weedon v. Weedon*, 207 P. 2d 78); or child support (*Puckett v. Puckett*, 136 P. 2d 1; *Hough v. Hough, supra*; *Howarth v. Howarth, supra*) are involved. The question of merger does not relate to the present transfer or division of property at the time of divorce but only to the enforceability of continuing provisions to be performed by one of the parties by the method of a motion before the divorce court rather than by a separate action upon the contract itself.

The case of *Shogren v. Superior Court*, 93 Cal. App. 2d 356, 209 P. 2d 108, reviews the entire history of California law with respect to incorporation or reference of a property settlement agreement as affecting its merger into a decree. This case arose upon a prohibition proceeding to restrain an order to show cause why petitioner should not be held in contempt for failing to make alimony payments.

b. In all cases where the question of merger is involved, it is with respect to the proper remedy to enforce compliance with, or to modify prospective terms included in a property settlement agreement; if there has been merger, contempt proceedings are appropriate (*Lazar v. Superior Court, supra*; *Shogren v. Superior Court, supra*), or a motion for modification (*Hough v. Hough, supra*; *Howarth v. Howarth, supra*). If the property settlement

agreement is made a part of the decree by reference only, there is no actual incorporation and even if the decree is recorded, there is no notice to the world of the respective interest of the parties of any property. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree of judgment alone. Since the file did not disclose that the agreement was copied in the decree as an integral part thereof, consequently contempt proceedings are unavailable to assist in its enforcement and resort may be had only to the usual contract remedies (*Price v. Price, supra; Shogren v. Superior Court, supra*).

c. With respect to transfers and settlement of property rights that occur concurrently upon the entry of a divorce decree, the question of merger is entirely irrelevant and when Bankrupt and Appellant have contracted to settle their property rights in existing property and said agreement is free from fraud, it is absolutely binding upon the Court (*Adams v. Adams, supra*). Since in the matter in question in these proceedings Bankrupt and Appellant changed their ownership from community to separate in existing property—the drugstore—by their Agreement, the transfer, if any, was accomplished by their contract and was binding upon the Court.

3a. Actually, although Appellant now contends in this proceeding that the property settlement agreement merged in the decree, this position is inconsistent with her actions in the State Court, for she filed an action against her former husband entitled a “Complaint for Damages”; in effect, an action upon the contract or the Property Settlement Agreement between the parties. There was no attempt to enforce the terms of the decree by an order to show cause why the Bankrupt should not be held in con-

tempt for his purported failure to perform in accordance with the provisions of the Property Settlement Agreement for the payment of monthly sums of money. In other words, the Appellant herself by her action agrees that there was no merger and she pursued the usual contract remedies, a lawsuit for damages for the breach of a contract (*Sanborn v. Sanborn*, 3 Cal. App. 2d 437, 39 P. 2d 830; *Robertson v. Robertson*, 34 Cal. App. 2d 113, 93 P. 2d 175).

b. However, even if it were to be held that the Property Settlement Agreement was merged in the decree, the rights of the parties, if they were intended to be affected by the entry of an interlocutory decree, were decided by the Bankrupt and Appellant between themselves in the Property Settlement Agreement. And since the Property Settlement Agreement was fair and free from fraud (*Robinson v. Robinson, supra*) and since the law approves property settlement agreements and contracts between husband and wife (*Hill v. Hill, supra; Adams v. Adams, supra*), this contract was valid at the time it was entered into; a valid contract does not lose the force of its validity nor do its executed provisions become affected or changed by reason of a subsequent merger—the merger being merely to provide a speedy remedy for the aggrieved party when the other has failed to perform under the provisions of the agreement (*Lazar v. Superior Court; Shogren v. Shogren; Price v. Price, supra*), or to relieve an erroneously burdened party who seeks modification of terms which have become inadequate over the passage of a period of years (*Hough v. Hough, supra*). And if this contract resulted in an effective change in the character of personal property as against creditors and therefore Appellee (Bankruptcy Act, Sec. 70c), it was by private contract, not by Court Order.

C. The Intent of the Legislature in Enacting California Civil Code Section 3440 Was for the Purpose of Permitting Bona Fide Purchasers of the Property and Businesses Enumerated Therein to Take the Same Free and Clear of Creditors' Claims.

1. This section provides that notice shall be given to the world of an intended transfer in order that creditors may be given notice of the change of ownership and take whatever remedies or steps they may deem necessary to insure the payment of the seller's indebtedness. Where property has been held and operated by a person and after the purported transfer of ownership is continued to be held and operated by him without any overt expression or act of change, there is no notice; and creditors may continue to extend credit to the original owner, relying upon the ostensible continued ownership of the person in possession.

2a. Appellant is obviously confused and argues from the point of facts that do not exist, rather than simply from the point of facts that do exist. Appellant argues from the negative and says she was not in possession and transferred an interest to Bankrupt, who was in possession. Actually, we have the situation which resolves itself into the following: Bankrupt was at all times in possession. He was commonly known to all of the creditors as the owner of the property; all licenses were in his name; he had every appearance of ownership. He operated the business; he made purchases; he was in active management of the business; he sold from behind the counter; he signed the checks; he paid the bills; he saw the salesmen of the supply houses. In short, he did everything in acts that an owner does [Tr. p. 34]. At no time was Appellant in charge of or connected with the

active operation of the business, nor was she in possession of the property [Tr. p. 35]. Therefore, the truth is and the case should be argued from the fact that, insofar as creditors are concerned, the Bankrupt in possession was the transferor and Appellant the transferee. No delivery whatsoever was made because Bankrupt, the transferor, remained in possession.

b. It is a *prima facie* fraud on creditors for Appellant to even set up her claim. The whole purpose of Section 3440 of the Civil Code is to avoid fraudulent transfers. If Appellant's contention is to be sustained, it would wreak havoc in the business world. Husband and wife at any time could enter into a contract, even without the necessity of a divorce, and could by the terms of that contract alter their interests in property from community to separate, record the document, and by such means defraud creditors of their just rights by removing from creditors the right to reach the assets of the business which thus apparently would be transmuted into the separate property of the wife. No law could support such action and no Court would sustain such contention, yet that is exactly what Appellant is seeking to do.

c. While the property was community, it was chargeable with all the community debts. Appellant, by claiming that a recorded Property Settlement Agreement takes that property away from creditors who continue to extend credit on ostensible ownership and continued possession by Bankrupt, seeks to accomplish a wrong both legally and morally. Recordation of the Property Settlement Agreement did not constitute notice to creditors, either actual or constructive, for the reason that no creditor is required nor expected to search the records of personal actions between parties to ascertain the exact nature

of the ownership of a going retail business. Notice to creditors is approved by statute. Thus, so far as creditor rights are concerned, the recordation of this document was ineffectual, and since no statutory notice to creditors was given, nor possession changed, creditors were *not* notified.

3a. In the cases which have been exempted by the terms of Section 3440 of the Civil Code from the provisions thereof, it is clear that notice is always given to creditors. All of the transfers or sales provided in said exempt cases are made by or through a Court of equity. In each case, by Order of said Court, *direct and actual notice*, as well as constructive notice by publication, is given to creditors. Therefore, the creditors may take their remedies against the original owner, or his estate, and the buyer in each case is protected. Examples of such transfers would be probate sales, receivership sales and assignee sales. In every case, there is actually notoriety given to the sale and there is creditor knowledge and interest in the transfer. Therefore, a compliance with the provisions of Section 3440 of the Civil Code as they relate to ordinary bulk sales would be surplusage, since the compliance is merely for the purpose of giving notice to the creditors of the seller.

b. This transfer between Bankrupt and Appellant of the property which they had owned in a definite character cannot be construed to be a transfer by Order of a Court of competent jurisdiction for the reason that the orders contemplated in the exemption of Section 3440 of the Civil Code require judicial sales.

c. Some types of judicial sales are, as follows: A sale under a judgment directing the sale of partnership property is a judicial sale where the Commissioner's au-

thority is derived from the judgment which specifically directs what is to be sold and how it is to be sold and no notice of sale need be published or posted (*Publer v. Olds*, 56 Cal. App. 2d 13, 132 P. 2d 236). When a Court having jurisdiction of the subject matter directs property to be sold for the purpose of carrying its judgment into effect, that constitutes a judicial sale and transfer by Order of Court (*Estate of Backesto*, 63 Cal. App. 265, 218 Pac. 597). A sale by an administrator of property of an estate in compliance with Court rules is a judicial sale (*Tracy v. Colby*, 55 Cal. 67).

D. A Divorce Court, Being a Court of Equity, Could Not Order a Transfer of Property in Derogation of Creditors' Rights.

1a. A divorce court is a court of equity and were it to order the transfer of property between husband and wife, it would, before making any such order, inquire into the rights of third parties, bona fide creditors, who might have claims against the parties. A principle of equity will not be applied for the purpose of defeating equity (*Lewis v. Hall*, 38 Cal. App. 329, 176 Pac. 171). Equity requires equality in support of a common burden (*Chipman v. Morrill*, 20 Cal. 130). And since in this case the debts incurred in the operation of the business were common, no court of equity would have transferred to the wife one-half of the drugstore assets free and clear of their burden of the liabilities. If the transfer between Bankrupt and Appellant made by this Property Settlement Agreement were to be held effective as against creditors, it would be an unconscionable miscarriage of justice because there was no notice at the time of the transfer, nor was there any change of possession to give notice or to

give any reason to third parties to inquire as to the facts regarding the change of ownership.

b. In connection with any adjudication of property rights and order of transfer by Court, if the Court were to award any division such as Appellant contends (one-half of all of the assets free and clear of any liabilities at the time of such order), the Court would clearly and necessarily have inquired into the existence and the amount of debts against the business. No evidence was presented or offered to be presented by Appellant to show that there was any such inquiry by the Court. On the contrary, evidence was introduced at the hearing in this case to show that the Agreement was merely approved by the divorce Court.

III.

The Property Settlement Agreement Entered Into Between Bankrupt and Appellant Did Not Create a Trust.

The Property Settlement Agreement was entered into between Bankrupt and Appellant when both parties were represented by counsel; the Agreement represented the result of negotiations had between the parties and their respective counsel (see App. Op. Br. p. 4, Par. 2).

When negotiations have been between adverse parties there is no confidential relationship and by the parties' express agreement it was intended by them that the property be changed in character from community to tenants in common.

Inasmuch as there is no contention here that the community property was mismanaged, it seems clear that the authorities cited by Appellant are not applicable (see App. Op. Br. p. 15B).

IV.

If Appellant Acquired a One-Half Interest as Tenant in Common in the Drugstore Business It Was in the Net Worth.

A. All That Appellant Could Have Acquired Was an Interest in the Net Worth of the Drugstore Business.

1. Even if the Property Settlement Agreement were to be construed most favorably in the light of Appellant's argument that it was completely merged in the decree, that there was never any transfer between Bankrupt and Appellant themselves, and that only the decree may be looked to; that by reason of the fact that the Court approved the Property Settlement Agreement this must be construed to be a transfer by Order of the Court and, therefore, this is to be construed as an exemption within the terms of Civil Code, Section 3440, or that Bankrupt had the duty of discharging a trust and upon that ground the transfer is exempt; or that Appellant out of possession transferred *to* Bankrupt in possession; nevertheless, even consenting for the sake of argument alone, that all of the foregoing is true, all that the Appellant received by this transfer was one-half interest in the net worth of the business.

2. Prior to the entry of an interlocutory decree of divorce, by the terms of the Property Settlement Agreement itself, the parties acknowledged that they held and owned the drugstore business as community property. Thus, Appellant owned an undivided one-half of the net worth of the drugstore (the value of the total assets less

the total liabilities) as community property. It has never been contended that while the property was community it was not liable for the debts incurred in its operation. In fact, it is freely admitted by Appellant that the Bankrupt managed, operated and controlled the business at all times, incurring from time to time indebtedness which was paid from the sales made in the operation of the business [Tr. p. 36, Finding X]. By law, as well as by consent of Appellant, Bankrupt had full management and control. Appellant did not at that time during the marriage own an undivided one-half interest in the assets free and clear of liability. No, she owned an undivided one-half interest in the difference between the total assets and total liabilities. The assets were subject to the liabilities. By the Property Settlement Agreement, this *type* of ownership was transmuted from community to separate property (*Thomas v. Hoffman, supra*). In other words, what Bankrupt and Appellant owned in community they now owned as the separate property of each, with the Appellant granting express consent to Bankrupt to continue full management and control.

3a. Referring back to the words of the Agreement itself, it says:

“The *drugstore* shall continue to be owned by the parties hereto as community property or, in the event an interlocutory decree of divorce is obtained by either party, then as tenants in common owning an undivided one-half interest.” [Property Settlement Agreement, Par. XIV.]

b. What is a drugstore but a going business? A going business has certain assets subject to its liabilities and it may or may not have good will. Therefore, when the parties in their Agreement mentioned the drugstore as such and expressly refrained from enumerating the particular assets which were assets of the drugstore, it is clear that the intent of the parties in dividing was to share a going business and not to divide, for example, one bottle of aspirin to the Bankrupt and one bottle to the Appellant. Such attempted division would clearly be impossible in view of the fact that the drugstore was not being liquidated but it was the express intention of the parties to continue operation and that "the drugstore shall remain under the active management and control of the husband" [Property Settlement Agreement, Par. XIV].

4. If Appellant had been intended to receive one-half of the assets free and clear of liabilities, it is clearly obvious that Bankrupt would not have been able to conduct and continue to manage and operate, nor could he have consented to continue to manage and operate the store. How would he have been able to operate? For example, if he had sold Appellant's bottle of aspirin, how would he have replaced it? If he had bought a new bottle of aspirin to replace the one sold, how would payment have been made for the new bottle? Is it to be held by this Court that Appellant is correct in saying Bankrupt would be obligated to pay the purchase price of the new replacement bottle of aspirin, yet after it was purchased it would become Appellant's because of the fact

that her bottle of aspirin had been sold? The contention of Appellant is so patently absurd as to deny it any serious consideration.

B. The "Net Worth" Could Have Been Transferred Even Though the Term "Net Worth" Itself Is Not Used in the Property Settlement Agreement.

It is not always necessary to "spell out" each word, but the Court may construe the intention of the parties from the sense of an agreement. Appellant wants the Court to read into the Agreement the intention to divide the *assets*, but the term "assets" is not used in the Agreement. The Agreement refers solely to the *drugstore* owned by the parties without reference to individual and specific assets relating thereto. In view of the detailed phrasing in the remaining portions of the Property Settlement Agreement, it must be construed and was construed by the Trial Court, that if the parties had intended the assets to be divided, Appellant would have so particularized them. In the ordinary and common usage, the term "drugstore" relates to a going business. This construction is strengthened by the fact that there is express delegation of authority to Bankrupt for the continuing operation of the business.

V.

An Illegal Contract Is Not Enforceable; It Is Illegal for Any Person to Sell Intoxicating Liquors or Perform Acts of a Licensee Unless Such Person Is Licensed by the State Board of Equalization; Therefore, Appellant Can Assert No Claim to the Alcoholic Beverage License and Stock-In-Trade.

A1. No matter what the intention of the parties may have been to divide and transfer their interest with reference to the Alcoholic Beverage License and the stock of liquor, nevertheless, such attempted transfer was absolutely ineffectual and void as being contra to the clear and definite terms of the California Alcoholic Beverage Control Act (Calif. Const., Article XX). This Act provides that it shall be unlawful for any person other than a licensee of the California State Board of Equalization to sell any intoxicating liquors in this State, and the State Board of Equalization has exclusive power to license as well as to revoke a license for a sale of intoxicating liquor (*Reynolds v. State Board of Equalization*, 29 Adv. Cal. 132). It further provides that no person shall exercise or perform under the authority of a license issued under this Act unless such person is authorized to do so by a license duly issued pursuant to the provisions of Section 3 of this Act, and any person violating the provisions of Section 3 is guilty of a misdemeanor.

2. In order that a person may become a licensee, an application must be made, verified under oath, to the State Board of Equalization; and must contain, among other things, the names and positions of all of the individual parties to the proposed license (State Alcoholic Beverage Control Act, Sec. 10), and no retail license is-

sued by the State Board of Equalization to sell intoxicating liquors shall be subject to transfer unless at least seven days before the filing of the transfer application with the State Board of Equalization the intended transferees shall record in the office of the County Recorder a notice of the intended transfer, stating, among other things, the name and address of the intended transferee (California Alcoholic Beverage Control Act, Section 7.2).

3. This Act is analogous to Civil Code, Section 3440 but does not contain any exemptions as does Section 3440.

B1. Now, although Bankrupt and Appellant intended that the Bankrupt should continue to manage and control and have full possession of the drugstore business, nevertheless, if Appellant's contentions are to be upheld, they intended to divide the retail Alcoholic Beverage License held solely in the name of the Bankrupt and also the stock of liquor. Since there was no compliance with the State Alcoholic Beverage Control Act [Tr. pp. 35-36 Finding VIII], Appellant's contentions could never at any time be upheld, at least with respect to the retail Alcoholic Beverage License and stock-in-trade of liquor, even if she were to be upheld on her contentions with respect to the remaining assets of the drugstore business.

2. There are many cases which have been decided in this State and which uniformly hold that there is no inherent right in any one to engage in liquor traffic and business (*Guzzi v. McAllister*, 21 Cal. App. 276, 131 Pac. 336). And an agreement for transfer of property including a liquor license is only legal when the transfer

of the license is intended to be in accordance with the State Alcoholic Beverage Control Act (*Leboire v. Black*, 84 Cal. App. 2d 260, 190 P. 2d 634).

C. Therefore, since Appellant was never a licensee and made no application for the transfer of the Alcoholic Beverage License to her, to say that she now has an undivided one-half interest in the Alcoholic Beverage License and stock-in-trade of liquor would be to uphold and enforce an illegal contract.

VI.

If Appellant Is a Tenant in Common of the Assets, She Is Liable for the Debts of the Drugstore Business Because Where Express Agency Is Created the Principal Is Liable for the Acts of His Agent Incurred in the Scope of His Authority.

A1. If all of Appellant's contentions were to be upheld and she were adjudicated to be a tenant in common of the assets of the drugstore business, then she is expressly and personally liable for the debts incurred by Bankrupt in the operation of the business from and after the date of entry of the interlocutory decree, June 9, 1949. Paragraph XIV of the Property Settlement Agreement, after reciting that Bankrupt and Appellant own the business as community property and shall upon the entry of an interlocutory decree continue to own the business as tenants in common, continues to state: "The drugstore shall remain under the active management and control of the husband." By this express creation of an agency,

Appellant made herself personally liable for all debts incurred in connection with the management and control and operation of the drugstore business which were incurred by her husband, Bankrupt herein.

2. That which a person does direct through his agent is in law deemed to have been done by himself (*O'Brien v. Leach*, 139 Cal. 222, 72 Pac. 1004). A principal cannot escape responsibility for an act done by his agent in his behalf (*Barr Lumber Company v. Perkins*, 214 Cal. 531, 6 P. 2d 948). In other words, Appellant is directly and personally liable to all creditors for the reason that if she is to be adjudicated a tenant in common of the assets rather than of the net worth of the drugstore business, she is by the same token to be held liable for the debts under the terms of the express agency created by her, naming her husband, the Bankrupt herein, as her agent.

3. The Property Settlement Agreement entered into between Bankrupt and Appellant was recorded in December, 1949. Therefore, if Appellant is contending that this gave notice of the accomplished transfer to the world and present creditors because such arose subsequent to the date of said transfer; nevertheless, she is liable because if she is the owner of the assets, she is the principal and is disclosed as principal of an agent who was instructed to operate and manage the drugstore business. A disclosed principal may be held liable on a contract made solely in the name of the agent (*Bank of America v. Cryer*, 6 Cal. 2d 485, 58 P. 2d 643). And even though an

agent signed his name to a contract as purchaser did not relieve his principal from liability where such agent was acting within the scope of his authority (*Ackerman v. Channel Com. Co.*, 53 Cal. App, 359; 199 Pac. 1101). Therefore, purchases made by Bankrupt must be paid for by Appellant if her contentions are upheld by this Court.

B. There is no quarrel with the authorities cited by Appellant (App. Op. Br., Par. V, p. 34 *et seq.*) relating to liabilities of tenants in common for debts created by their fellow tenants in common; however, it is respectfully submitted that not one of these cases refer to the issue presented before this Court. In not one of the authorities cited by Appellant was there any express agency created by one tenant in common to the other. On the contrary, Appellant herself made the unequivocal qualification in her headnote (Op. Br. p. 34) that a tenant in common is not liable for the debts incurred by a cotenant *in the absence of authority given to the cotenant*. Where there is merely an ownership as tenants in common of a thing, a gratuitous and unauthorized creation of a liability by one of the tenants in common does not impose liability on the other; and since it is clear that such is not the case in these proceedings, there will be no further comment on the matter.

C. By the creation of an express agency, if Appellant is held to be a tenant in common of actual assets rather than net worth, she would have full liability under the laws of agency for all debts incurred by her agent within the scope of his agency.

VII.

It Was Not Necessary to Find a Creditor Was Prejudiced or Misled by Execution of the Property Settlement Agreement or Entry of the Decree of Divorce.

A. It was not necessary to make any express finding that a creditor of the business was misled or prejudiced by the execution of the Property Settlement Agreement or entry of the divorce decree for the reason that there can only be one of two alternative conclusions by this Court, as follows:

1. Either the purported transfer of the property to Appellant as her separate property was void as being in contravention of the express provisions of Civil Code, Section 3440, relating to transfers of personal property; or, if this Court holds that said transfer became effective, then

2. Appellant became the owner of said property and as owner appointed Bankrupt her agent to manage, possess, control and deal with said property.

B. In either of the foregoing, the creditors are protected. If the first conclusion is reached, the transfer being ineffectual, the creditors may resort to the entire proceeds of the assets of the drugstore; and, in the latter, the creditors may proceed directly against Appellant as principal for the entire amount of liability incurred and created in connection with the operation of said drugstore by Bankrupt pursuant to express agency.

Conclusion.

Based upon the foregoing, this Court should affirm the Order of the Referee, as affirmed by the District Court, quieting title in the Trustee in Bankruptcy Appellee herein to that certain drugstore business known as Jerry's Drugstore, 206 North Main Street, Lone Pine, California.

Respectfully submitted,

DOROTHY KENDALL,

Attorney for Appellee.

No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of
Joseph E. Allen, Bankrupt,

Appellee.

PETITION FOR REHEARING.

HARRY R. ROBERTS,

JESS G. SUTLIFF,

WM. HOWARD NICHOLAS,

634 South Spring Street,

Los Angeles 14, California,

Attorneys for Appellant.

MAY 24 1952

PAUL P. O'BRIEN

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No. 13126
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of
Joseph E. Allen, Bankrupt,

Appellee.

PETITION FOR REHEARING.

Introduction.

In the oral argument of this case this Court through its Presiding Justice, indicated that it was not prepared to follow the District Court in its affirmance of the Order of the Referee under review in this appeal upon the grounds upon which that order was made. In the opinion of this Court, filed April 30, 1952, this Court has adhered to that position and appears to have conceded appellant's arguments that appellant's interest is in the assets of the business and not in net worth thereof and that the conversion of her community interest to a tenancy in common was not in violation of Section 3440 of the Civil Code. The Court now proceeds to hold adversely to appellant upon a theory of agency, a theory which has been

repudiated by both the District Court and the Referee. In applying a new and novel theory to the appeal, this Court has proceeded to decide the case without the benefit of comprehensive briefs on the point. We do not question the power of the Court to review the case upon a consideration of all of the questions which it sees as presented by the appeal. We do, however, consider the application of a new and novel theory to the appeal without the opportunity of counsel to be heard a dangerous expedient pregnant with possibility of error and the miscarriage of justice. Whenever an appellate court has made such a departure, however clear its authority may be to do so, a petition for a rehearing is singularly appropriate.

Assignment of Errors in the Opinion.

1. This Court has erred in its opinion by failing to consider the fact that all of the bankrupt's creditors had notice *as a matter of law* of the limitations imposed upon the bankrupt by the terms of the property settlement agreement by reason of the recording of the agreement in the County in which the business was located and in which the divorce proceedings were had.

2. This Court has erred in its opinion in that it has failed to consider that the property settlement agreement was recorded and the holding of this Court is contrary to Sections 165 and 166 of the Civil Code and the cases decided thereunder, to wit, *Carter v. McQuade* (1890), 83 Cal. 274 (23 Pac. 348), and *Shumway v. Leakey* (1885), 67 Cal. 458 (8 Pac. 12).

3. This Court has erred in its opinion in that it has construed the property settlement agreement as conferring upon the bankrupt express authority as appellant's agent to buy merchandise and generally to incur debts without limit upon the credit of appellant's interest in the assets of the business.

4. This Court has erred in its opinion in that it has construed the property settlement agreement as creating a broad general agency rather than a limited and restricted agency as existing between the bankrupt and appellant for the purposes of the conduct of the business.

5. This Court has erred in its opinion by failing to recognize that none of the creditors furnished merchandise or credit to the bankrupt on any basis except the bankrupt's individual credit.

6. This Court has erred in its opinion by failing to recognize that the prior adjudication that no partnership ever existed between the bankrupt and appellant necessarily implies that no general agency ever existed between the bankrupt and appellant.

7. This Court has erred in its opinion by holding that creditors who are charged by law with notice of the bankrupt's limited authority had superior rights to the bankrupt himself.

A. Under Sections 165 and 166 of the Civil Code, Each and Every Creditor of the Bankrupt Had Constructive Notice as a Matter of Law of Each and Every Term of the Property Settlement Agreement.

1. The Property Settlement Agreement Was Recorded in Inyo County and Was Entitled to Recordation Under the Law.

The property settlement agreement [Tr. p. 49] was, shortly after the entry of the Interlocutory Decree, recorded in the office of the Recorder of Inyo County [Tr. p. 32], the same being the County in which the drug store was located and in which the divorce proceedings were pending.

Section 165 of the Civil Code provides that either spouse may make an inventory of his or her separate personal property, and when signed by such spouses and acknowledged in the manner required by law for the acknowledgment of a grant of real property, the same may be recorded in the Office of the County Recorder in which the parties reside. The property settlement agreement fulfills the statutory requirements for an inventory in that it was signed by both parties and bears an acknowledgment [Tr. pp. 60-61]. It would appear that the property settlement was entitled to be recorded not only under the terms of Section 165 of the Civil Code, but also under Section 27322 of the Government Code which latter section enumerates the kinds of instruments entitled to recordation as including:

“(j) Instruments describing or relating to the separate property of married women.”

Moreover, since the property settlement agreement also provides for the disposition of two unimproved lots in the Town of Lone Pine, County of Inyo, it would also be entitled to recordation under the terms of Sections 1213 and 1215 of the Civil Code.

2. **The Recording of an Inventory of the Separate Property Is Notice to the World of the Title of the Spouses and Is Prima Facie Evidence of Title as the Separate Property of the Spouses.**

“The filing of the inventory in the Recorder’s Office is notice and prima facie evidence of the title of the party filing such inventory.” (Civil Code, Sec. 166.)

Sections 165 and 166 of the Civil Code were intended to provide a wife with a means of protecting her separate property because of the inherent difficulty resulting from her relations as a wife (*Morgan v. Ball* (1899), 81 Cal. 93, 96, 22 Pac. 331). Section 27322 of the Government Code (formerly Sec. 4131 of the Political Code) is to be liberally construed with a view to effect its objects and to promote justice (*Beatty v. Hughes* (1943), 61 Cal. App. 2d 489, 143 P. 2d 110).

Not only in form would the property settlement agreement qualify as an inventory, but also in substances it had such a character, even though it was not so designated in the caption. The agreement provided for a complete disposition of the property owned by both the bankrupt and the appellant. By its terms the property transferred thereby was to be the separate property of the party receiving the same. The rights of appellant and the bankrupt as tenants in common in the assets of the drug store business were, of course, separate property.

3. Where a Husband and Wife Separate and Enter Into a Property Settlement Agreement by the Terms of Which the Husband Transfers to the Wife Personal Property Without Any Intent to Hinder, Delay or Defraud Any of His Creditors, and the Wife Thereafter Records, Pursuant to Section 165 of the Civil Code, an Inventory of the Property Transferred to Her Under the Terms of the Property Settlement Agreement, It Has Been Held That the Transfer Is Valid Against the Husband's Creditors and Is Not Subject to Levy for His Debts.

Carter v. McQuade (1890), 83 Cal. 274, 23 Pac. 348.

Accord:

Shumway v. Leahey (1885), 67 Cal. 457, 8 Pac. 12.

The husband's creditors are therefore within the class of persons conclusively charged with notice by the recording of an instrument describing or relating to the separate property of a married woman or providing an inventory of the same. It would appear from Section 166 of the Civil Code that a recorded inventory is notice to all the world of the title of a married woman to the property described therein as her separate property. Since this section was intended to operate so extensively, it should be liberally construed and is to be distinguished in its operation from other recording statutes which operate to impute notice only to a limited class, *e. g.*, subsequent purchasers and mortgagees (*Cf.* Civil Code, Sec. 1213).

4. Constructive Notice and Actual Knowledge Are in the Contemplation of the Law Equivalent and the Bankrupt's Creditors Could Not Show That They in Fact Did Not Know of the Terms of the Property Settlement Agreement.

The recording of an instrument gives constructive notice of its entire contents to all persons designated in the recording statute as bound by its terms (*Duncan v. Ledig* (1949), 90 Cal. App. 2d 7, 12, 202 P. 2d 107). The presumption of knowledge resulting from recordation of an instrument is conclusive and incontrovertible (*Anderson v. Willson* (1920), 48 Cal. App. 289, 293, 191 Pac. 1016; *Fair v. Stevenot* (1866), 29 Cal. 486, 488; 22 Cal. Jur. 616). Therefore, the creditors of the bankrupt herein could not by any competent evidence show that they did not have actual knowledge of the terms of the property settlement agreement, since under *Fair v. Stevenot, supra*, such evidence would be inadmissible.

There is no evidence in the record before this Court, or any finding to the effect, that the creditors of the bankrupt did not have actual notice of all of the terms of the property settlement agreement. The Trustee has introduced no evidence before the Referee that any creditor was any-wise actually prejudiced or lulled into a false sense of security by the terms of the property settlement agreement, as implemented by the divorce decree. If the Trustee had such evidence, the Trustee surely would have introduced it, and the Trustee was obligated under the law to present *all of his contentions*

to invalidate the claim of the appellant to the assets of the business and could not before the Referee litigate her title piecemeal. Since constructive notice is in law the equivalent actual notice, the creditors are in no position to claim special or preferential treatment.

B. The Property Settlement Agreement Is to Be Construed as a Whole and All of Its Provisions Are to Be Given Effect, and When so Construed, the Agency of the Bankrupt to Manage the Business Was a Limited and Special Agency to Operate the Drug Store in the Ordinary Course of Business Without, However, Any Authority to Incur Debts or Purchase Merchandise on the Credit of Appellant or Upon the Credit of Her Interest in the Drug Store.

1. **The Property Settlement Agreement Specifically Denies to the Bankrupt Any Authority to Incur Any Debts or Liabilities Whatsoever on Behalf of the Appellant.**

“First: That, except as hereinafter provided, each party hereto is hereby *released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all debts, liabilities and obligations of every kind and character incurred by the other from and after this date*, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided.” [Tr. p. 50; italics added].

The clause in the above paragraph, "except as hereinafter provided," was a reservation to limit the generality of the release and to prevent the impairment of the executory obligations under the agreement. By the terms of the agreement, the husband was to pay to the wife \$125.00 per month for child support, \$225.00 per month to the wife herself, and the first \$15,000.00 from the proceeds of the sale of the business, or in the event the business was not sold, to pay the wife \$15,000.00 in installments as therein provided for her interest in the business, and in addition to set up a trust fund in the amount of \$10,000.00 for the minor children.

2. **The Management Clause Contained in the Property Settlement Agreement Constitutes a Mere Consent by Appellant to the Bankrupt's Operation of the Drug Store in the Ordinary Course of Business and for That Purpose the Bankrupt Was No More Than Appellant's Special Agent.**

The management clause, *i. e.*, "The drug store shall remain under the active management and control of the husband," was inserted into the agreement for the obvious reason that the law requires any person to hold a license as a pharmacist to sell any drugs, nostrums, ointments or appliances for the treatment of disease, deformities or injuries (Bus. and Prof. Code, Sec. 4071). The obvious purpose and scope of the authority delegated to the bankrupt by the appellant by virtue of the management clause was to enable the bankrupt to sell the merchandise under his license as a registered pharmacist. There is no question that this clause enabled the bankrupt to pass good title to the merchandise purchased by the customers of the business. This Court reasons in its opinion from the premise that since the bankrupt could

pass good title to the merchandise, the bankrupt could subject appellant and her interest in the business to the liability to the payment of debts in the bankrupt's *purchase of merchandise*. This is a *non sequitur*. The purchase of merchandise and the sale of merchandise are entirely different matters and concern different classes of individuals whose rights rest upon different principles and who are separately treated in the property settlement agreement. We have already advanced the argument that the bankrupt's creditors were conclusively charged with notice as a matter of law that the bankrupt had no authority to incur any debts upon the credit of appellant or upon the credit or security of her interest in the business. The bankrupt's creditors sold merchandise to the bankrupt strictly on his individual credit. Charged with notice of his limited authority, his creditors could have dealt with him on no other basis, except, of course, on a cash basis.

3. The Test of the Rights of Creditors Is the Objective Test of What a Reasonable Man Would Believe Was the Authority of Bankrupt in Connection With the Business.

By reason of their constructive notice of the terms of the property settlement agreement, the bankrupt's creditors were no less bound by the limitations contained in the agreement than the bankrupt himself. The true test of the rights of the bankrupt's creditors is: Could a creditor as a reasonable man believe, knowing each and every term of the entire property settlement agreement, that the bankrupt had any authority in the purchase of merchandise or the incurring of debts in the operation of the business on behalf of the appellant or upon the strength of her interest in the business?

Certainly no competent lawyer could advise a creditor who submitted the property settlement agreement to him for an opinion, that his client would extend any credit to the bankrupt as the agent of appellant. His advice would be that without further authority from appellant, the creditor would have to look to the individual credit of the bankrupt or deal with him strictly on a cash basis.

Whatever vices the agreement may have from the standpoint of draftsmanship, these vices are its very strength. The agreement omits to provide for many contingencies which would normally arise. The novelty of the arrangement, the obvious omissions of protective provisions, the doubts which it engenders in any mind, are all factors which constitute a veritable "red flag" to creditors. There could be hardly a clearer warning to creditors than the specific provisions in the property settlement agreement denying to the bankrupt any authority to contract debts on behalf of appellant. These provisions are unambiguous and their understanding requires the services of no one specially trained in the law.

4. **To Construe the Property Settlement Agreement as Creating a General Continuing Agency on the Part of the Bankrupt to Incur Debts and Liabilities Without Limitation on Behalf of Appellant in the Operation of the Drug Store, Is to Defeat One of the Primary and Principal Objects of the Property Settlement Agreement, Namely, the Final Settlement of Rights and Duties.**

The property settlement agreement recites that it is the desire of both parties to accomplish a full and final adjustment of their property rights and claims [Tr. p. 49]. The very first covenant in the agreement releases and absolves each party from all obligations or the liabilities for the future acts and duties of the other, and

each of the parties thereby “releases the other from any and all debts, liabilities and obligations of every kind and character incurred by the other from and after this date,” and concludes with the recitation that it is the purpose of the agreement to “settle the rights of the parties hereto in all respects, except as hereinafter provided” [Tr. p. 50]. The agreement further provides that all property acquired by either shall be the separate property of the party acquiring the same [par. “Second,” Tr. p. 50], and the wife agrees to accept the provisions of the agreement in full satisfaction of her right to the community property and in full satisfaction of her right and support and maintenance [par. “Fifth,” Tr. pp. 51-52].

If a general agency were created by the terms of the property settlement agreement for the bankrupt to incur debts without limit on behalf of the appellant, no finality in the settlement and adjustment of their rights would be accomplished. There can be no question that it was the intent of both the bankrupt and the appellant to deny to the bankrupt any authority to incur debts on behalf of the appellant or her interest in the business. Certainly this authority cannot be inferentially found in a mere isolated sentence when its existence is specifically denied by the agreement.

5. **The Bankrupt Could Have Continued to Manage the Drug Store by Maintaining His Operation on a Cash Basis or Upon the Strength of His Own Individual Credit and This Was the Obvious Purpose and Plan Which the Parties Had in Mind When They Executed the Agreement.**

There is no evidence before this Court that the creditors of the bankrupt extended any credit to him on any

basis other than his individual personal credit. Indeed, his creditors had no alternative except to insist upon cash payment since they were charged as a matter of law with notice of his special and limited authority so far as the rights of the appellant were concerned.

C. There Can Be No Actual or Ostensible Authority to Do an Act of Which the Third Person Has Actual or Constructive Notice the Agent Has No Authority to Perform.

1. When a Third Person Has Actual or Constructive Notice of the Restrictions Placed Upon the Authority of the Agent, the Third Person Cannot Hold the Principal for the Agent's Acts in Contravention of His Authority.

Civil Code, Sec. 2318;

Restatement of the Law of Agency, Secs. 166 and 167.

2. Where Authority Is Given Partly in General and Partly in Specific Terms, the General Authority Gives No Higher Powers Than Those Specifically Mentioned.

Civil Code, Sec. 2321;

Restatement of the Law of Agency, Sec. 37.

3. Appellant Is Not Liable to the Bankrupt's Creditors on the Theory of Ostensible Agency Because There Is No Proof That Appellant Intentionally or Negligently Caused Any Creditor to Believe That the Bankrupt Had Any Authority to Bind Her by Any Contract.

Civil Code, Secs. 2317 and 2318.

4. There Can Be No Ostensible Authority When the Third Person Has Actual or Constructive Notice of the Restrictions on the Agent's Authority.

Civil Code, Sec. 2318.

D. The Absence of a General Agency in the Bankrupt to Incur Debts in the Operation of the Business as the Agent of Appellant Is Implicit in the Adjudication That No Partnership Ever Existed Between Bankrupt and the Appellant in the Operation of the Business.

The opinion of this Court concedes for the purposes of the argument that appellant and the bankrupt acquired by virtue of the property settlement agreement, as implemented by the divorce decree, an interest in the physical assets as tenants in common. The opinion then proceeds to hold that a general agency existed in the scope of which the bankrupt was the agent of appellant for the purpose of incurring debts in the operation of the business. The difficulty with this reasoning is, among other things, that the Court has assumed one of the elements of the partnership, and deduces another element of partnership, and does not recognize that whenever common ownership in the assets of a business is coupled with a *general* agency between the co-owners in the conduct thereof, a partnership must as a matter of law exist between the co-owners. No other legal relationship is possible where common ownership and general agency between the owners coexist.

In the earlier bankruptcy proceeding the argument was made that by reason of the common ownership in the assets and an alleged general authority in the bankrupt to incur debts in the operation of the business, that the bankrupt and appellant were co-partners. This contention was rejected by the Referee. The Referee concluded

that no partnership whatsoever existed. This was an adjudication that neither an express partnership nor a partnership by estoppel was present. Unless a true estoppel exists by proof of either representation or acquiescence by the party to be charged and reliance thereon by a third person, no ostensible partnership can be proved. (*Hansen v. Burford* (1931), 212 Cal. 100, 297 Pac. 908; *Richlin v. Union Bank & Trust Company* (1925), 197 Cal. 296, 240 Pac. 782; *In re Brunson & Bunch*, 79 Fed. Supp. 833.)

That every partner is a general agent of his co-partner in the conduct of the partnership business is an elementary principal and has been incorporated in the Uniform Partnership Act.

Corporations Code, Sec. 15009, Subd. (1).

A partnership is defined as an association of two or more persons to carry on as co-owners, a business for profit (Corporations Code, Sec. 15006). The mere common property or part ownership does not itself establish a partnership whether such co-owners do, or do not, share any profits made by the use of the property (Corporations Code, Sec. 15007, Subd. (2)). The Uniform Partnership Act further provides that the sharing of gross returns does not of itself establish a partnership whether or not the persons sharing them have a common right or interest in any property from which the returns are derived (Corporations Code, Sec. 15007, Subd. (3)). The ultimate test of a partnership is

whether a community of interest exists between two or more persons in the conduct of the business for profit (*In re Brunson & Bunch*, 79 Fed. Supp. 833).

By concluding that a general agency existed between appellant and bankrupt in the conduct of the business, and by correctly conceding that the bankrupt and the appellant were co-owners of the assets of the business, this Court has ignored the fact that it now implicitly finds that a partnership existed between the appellant and the bankrupt. While the Court has not used the term "partnership," this conclusion is legally implicit and logically inescapable. To foreclose the contention ever being made that a general agency existed between appellant and the bankrupt is the very reason why counsel for the appellant insisted on findings by the Referee that it had earlier been adjudged that no partnership existed between the bankrupt and appellant in the conduct of the business. That order, of course, is an adjudication that no partnership, whether by consent or by estoppel, has ever existed between appellant and the bankrupt. That order and its necessary implications are as much binding on this Court as any other.

Conclusion.

The order of this Court will, unless set aside, result in a gross miscarriage of justice. The bankrupt has almost from the beginning breached his obligations under the terms of the property settlement agreement requiring appellant to institute a proceedings for its enforcement. This Court in its opinion has failed to consider many

relevant facts and has reached a conclusion not warranted by the record in this case or the law for the reasons hereinabove given. The creditors are entitled to no preferential treatment. Neither the bankrupt nor his creditors have rights superior to those of appellant. The opinion should be set aside and a rehearing granted.

Respectfully submitted,

HARRY R. ROBERTS,

JESS G. SUTLIFF,

WM. HOWARD NICHOLAS,

Attorneys for Appellant.

Certificate of Counsel.

I, Harry R. Roberts, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

HARRY R. ROBERTS,

Attorney for Petitioner.

No. 13127

United States
Court of Appeals
for the Ninth Circuit.

INLAND MOTOR FREIGHT, INC., a Corporation
and PACIFIC HIGHWAY TRANSPORT,
INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington,
Northern Division.

FILED

DEC 24 1951

No. 13127

**United States
Court of Appeals**
for the Ninth Circuit.

INLAND MOTOR FREIGHT, INC., a Corporation
and PACIFIC HIGHWAY TRANSPORT,
INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Eastern District of Washington,
Northern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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In the District Court of the United States for
the Eastern District of Washington, Northern
Division

No. 906

ANCHOR CASUALTY COMPANY, a Corpora-
tion,

Plaintiff,

vs.

INLAND MOTOR FREIGHT, INC., a Corpora-
tion, and PACIFIC HIGHWAY TRANS-
PORT, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff complains of defendants and alleges:

I.

Plaintiff, Anchor Casualty Company, is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business in the City of St. Paul in the State of Minnesota; defendants, Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., are, and at all times herein mentioned, have been corporations organized and existing under the laws of the State of Washington, each having its principal place of business and registered office in the City of Spokane, County of Spokane, State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That plaintiff is, and at all times herein mentioned, has been duly authorized to transact business in the State of Washington, and to issue policies of insurance therein covering liability of owners or operators of automotive equipment for bodily injury to others and damage to property of others arising out of the operation thereof; and has paid all fees due the State of Washington under existing laws.

III.

On or about April 1, 1949, the defendants procured from plaintiff, and plaintiff issued to them, a policy of insurance insuring them for the period of one (1) year from said date against such liability arising out of the operation of automotive equipment owned or operated by them, in consideration of premiums therein agreed by said defendants to be paid to plaintiff. Said policy provided that said premiums should be paid by defendants to plaintiff monthly in amounts based upon their gross receipts accruing each month from the operation or use of automotive equipment in their business operations, said monthly payments to be at the rate of 90c premium for each \$100.00 of gross receipts of the defendant, Inland Motor Freight, and \$1.35 for each \$100.00 of gross receipts of Pacific Highway Transport, Inc.; gross receipts being in said policy defined to mean the total gross revenue before deductions of any charges or expenses, and regardless of whether such revenue was

collected or not, accruing from the operation or use of automotive equipment in the business operations of the defendants. Said policy further provided that it might be cancelled by the insured, the said defendants, in which case the earned premiums should be computed in accordance with the customary short rate table and procedure.

IV.

The defendants cancelled said policy when the same had been in force a period of sixty-one (61) days; that the gross receipts of the defendant, Inland Motor Freight, Inc., during said 61 days was the sum of \$456,650.61, upon which the aggregate earned premium at the rate so specified amounted to \$4,109.85, and upon which the short rate penalty due to said cancellation amounted to \$2,529.91; that the gross receipts of Pacific Highway Transport, Inc., during said 61 days was \$311,848.46, upon which the earned premium at the rate specified in said policy amounted to \$4,209.95, and upon which the short rate penalty for cancellation amounted to \$2,591.53; the total of said premiums and short rate penalty being in the amount of \$13,441.24 earned and becoming due the plaintiff under said policy. Defendants have paid plaintiff the sum of \$8,319.84 to apply upon said premiums, leaving a balance which is due and owing plaintiff of \$5,121.40, together with interest thereon at the rate of six per cent (6%) per annum from June 1, 1949.

Wherefore, plaintiff demands judgment against the defendants for the sum of \$5,121.40, together

with interest thereon at the rate of six per cent (6%) per annum from June 1, 1949, to the date of judgment herein.

WITHERSPOON, WITHER-
SPOON & KELLEY,

/s/ WILLIAM V. KELLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed October 12, 1950.

[Title of District Court and Cause.]

VOLUNTARY BILL OF PARTICULARS

Comes now plaintiff above named and furnishes, by way of a voluntary bill of particulars, the information asked for in defendants' motion for more definite statement, by attaching as Exhibit "A" a true and correct copy of the policy of insurance referred to in paragraph III of plaintiff's complaint.

Dated this 8th day of January, 1951.

WITHERSPOON, WITHER-
SPOON & KELLEY,

/s/ WM. V. KELLEY,
Attorneys for Plaintiff.

Declarations

- Item 1.** NAME OF INSURED INLAND MOTOR FREIGHT, INC., AND PACIFIC HIGHWAY
TRANSPORT, INC.
Address 1071 S. E. Water, Portland, Oregon
(Number, Street, Town, County, State)
The automobile will be principally garaged in the above town, county and state, unless otherwise stated herein:
The named insured is CORPORATION
(Individual, Corporation or Co-partnership; if latter, give names of partners)
Occupation of the named insured is FREIGHT LINE
(If married woman, give husband's occupation or business)
- Item 2.** POLICY PERIOD: From APRIL 1 1949 to APRIL 1 1950
twelve and one minute o'clock A. M., standard time at the address of the named insured as stated herein.
- Item 3.** The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES	LIMITS OF LIABILITY	PREMIUMS
A. BODILY INJURY LIABILITY.	\$ <u>25,000</u> each person. \$ <u>100,000</u> each accident.	\$ <u>SEE</u>
B. PROPERTY DAMAGE LIABILITY.	\$ <u>25,000</u> each accident.	\$ <u>END. #1</u>
C. MEDICAL PAYMENTS	\$ each person.	\$
D. COMPREHENSIVE.		\$
E. COLLISION OR UPSET.	Actual Cash Value less \$ deductible.	\$
E-I. CONVERTIBLE COLLISION OR UPSET.	Actual Cash Value. Additional Payment \$	\$
F. FIRE, LIGHTNING AND TRANSPORTATION.		\$
G. THEFT.		\$
H. WINDSTORM, EARTHQUAKE, EXPLOSION, HAIL OR WATER.		\$
I. COMBINED ADDITIONAL COVERAGE.		\$
J. TOWING AND LABOR COST.	\$10 for each disablement.	\$

DEPOSIT Total Premium \$ 4,500.00

- Item 4.** Description of the automobile and facts respecting its purchase by the named insured:

Year of Model	Trade Name	Type of Body (Truck Load, Gal- lonage, Bus-Seating Capacity)	Motor Number and Serial Number	No. of Cyls. and Model	Factory List Price or Symbol	Actual Cost When Pur- chased Including Equipment	Purchased		
							Month	Year	New or Used
			M	Cyle.					
			S	Mdl.					

- Item 5.** The purposes for which the automobile is to be used are COMMERCIAL CARS - COMMERCIAL PURPOSES
PASSENGER CARS - BUSINESS & PLEASURE

- (a) The term "pleasure and business" is defined as personal, pleasure, family and business use.
(b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes.
(c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

- Item 6.** The automobile is unencumbered unless otherwise stated herein:
- | Encumbrance | Installment Payments | | Due Date and Amount of
Final Installment |
|-------------|----------------------|----------------|---|
| | Number | Amount of Each | |
| \$ | | \$ | \$ |

Any loss under Coverages D, E, E-1, F, G, H and I is payable as interest may appear to the named insured and.....

NO EXCEPTIONS

(Name and Address)

- Item 7.** (a) During the past year no insurer has cancelled any automobile insurance issued to the named insured; (b) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile:

Exception, if any, to (a) or (b) NO EXCEPTIONS

Countersigned at PORTLAND, OREGON this 5TH day of APRIL 19 49

By _____
Authorized Agent.

ANCHOR CASUALTY COMPANY

(A STOCK INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

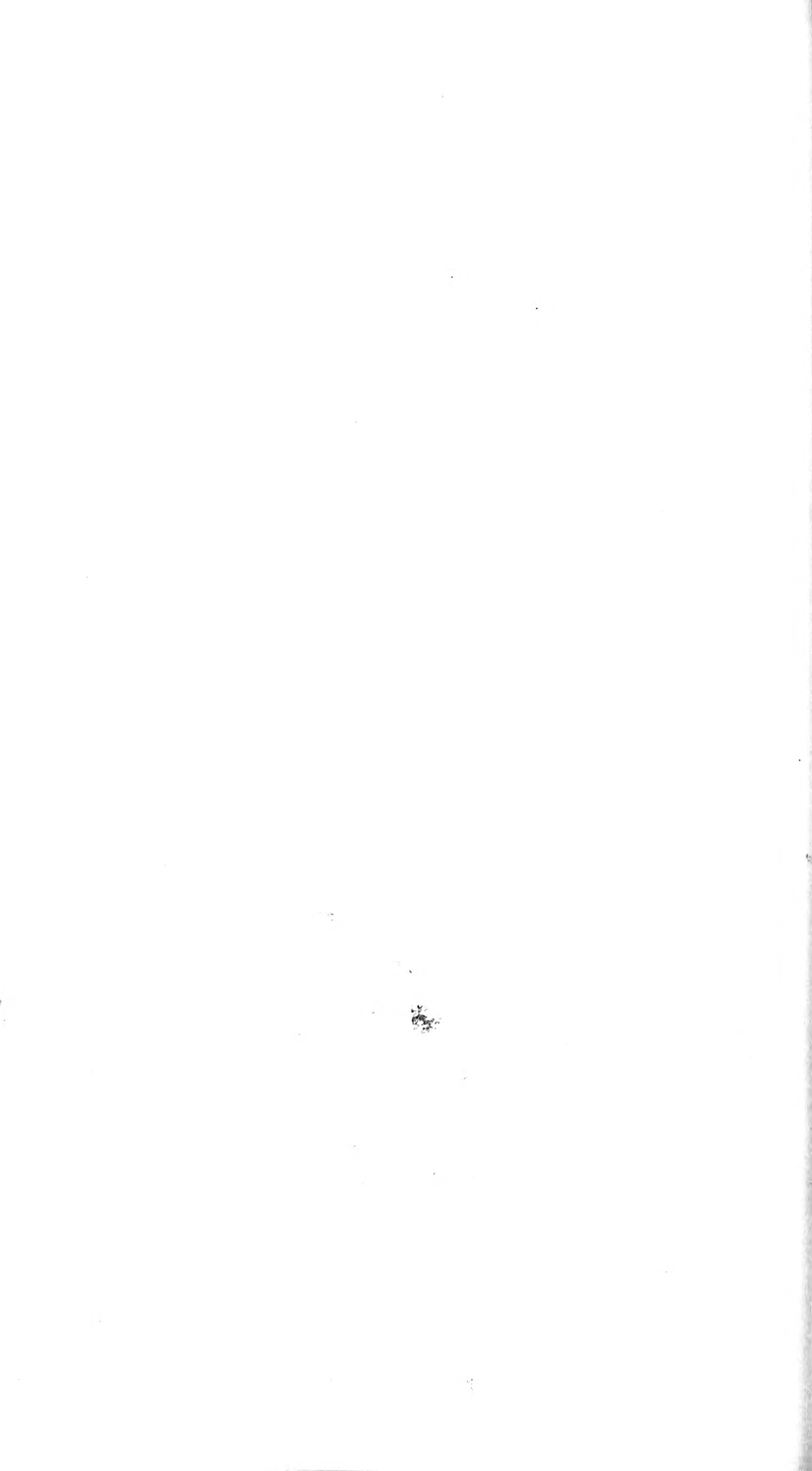
DOES HEREBY AGREE with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

- I. **COVERAGE A—BODILY INJURY LIABILITY.** To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.
- COVERAGE B—PROPERTY DAMAGE LIABILITY.** To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.
- COVERAGE C—MEDICAL PAYMENTS.** To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.
- COVERAGE D—COMPREHENSIVE LOSS OF OR DAMAGE TO THE AUTOMOBILE, EXCEPT BY COLLISION OR UPSET.** To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.
- COVERAGE E—COLLISION OR UPSET.** To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.
- COVERAGE E-1—CONVERTIBLE COLLISION OR UPSET.** To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile. Upon the occurrence of the first loss for which payment is sought hereunder the insured shall pay to the company the additional payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.
- COVERAGE F—FIRE, LIGHTNING AND TRANSPORTATION.** To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.
- COVERAGE G—THEFT.** To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.
- COVERAGE H—WINDSTORM, EARTHQUAKE, EXPLOSION, HAIL OR WATER.** To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water except loss resulting from rain, snow or sleet.
- COVERAGE I—COMBINED ADDITIONAL COVERAGE.** To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water except loss resulting from rain, snow or sleet.
- COVERAGE J—TOWING AND LABOR COSTS.** To pay for towing and labor costs necessitated by the disablement of the automobile provided the labor is performed at the place of disablement.
- II. **DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS.** As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall:
 - (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
 - (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;
 - (c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
 - (d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident, reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.
- III. **DEFINITION OF INSURED.** With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:
 - (a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;
 - (b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.
- IV. **AUTOMOBILE DEFINED, TRAILERS, TWO OR MORE AUTOMOBILES.**
 - (a) **Automobile.** Except where stated to the contrary, the word "automobile" means:
 - (1) **Described Automobile**—the motor vehicle or trailer described in this policy;
 - (2) **Utility Trailer**—under coverages A, B and C, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;
 - (3) **Temporary Substitute Automobile**—under coverages A, B and C, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;
 - (4) **Newly Acquired Automobile**—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under coverages D, E, E-1, F, G, H and I its equipment and other equipment permanently attached thereto.
 - (b) **Semitrailer.** The word "trailer" includes semitrailer.
 - (c) **Two or More Automobiles.** When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages D, E, E-1, F, G, H, I and J.
- V. **USE OF OTHER AUTOMOBILES.** If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:
 - (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.
 - (b) This insuring agreement does not apply:
 - (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
 - (2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;
 - (3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;
 - (4) under coverage C, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.
- VI. **LOSS OF USE BY THEFT—RENTAL REIMBURSEMENT.** The company, following a theft covered under this policy, shall reimburse the named insured for expense not exceeding \$5 for any one day nor totaling more than \$150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs. Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft. Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.
- VII. **GENERAL AVERAGE AND SALVAGE CHARGES.** The company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the named insured becomes legally liable.
- VIII. **POLICY PERIOD, TERRITORY, PURPOSES OF USE.** This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period while the automobile is used, maintained and used for the purposes stated as applicable thereto in the declaration and is within the United States of America, its territories or possessions, Canada, or Newfoundland (or being transported between ports thereof), or that part of Mexico which is not more than seventy-five (75) miles from the southern boundary line of the United States of America, provided the insured's place of residence and the principal garaging of the automobile is in the United States of America and that any use of the automobile in Mexico is for occasional trips of not over ten days duration.



This policy does not apply:

EXCLUSIONS.

- (a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;
- (b) under coverages A, B and C, to liability assumed by the insured under any contract or agreement;
- (c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company, or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;
- (d) under coverages A and C, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;
- (e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;
- (f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;
- (g) under coverage C, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;
- (h) under coverages D, E, E-1, F, G, H, I and J, while the automobile is subject to any bailment, lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;
- (i) under coverages D, E, E-1, G, H, I and J, to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;
- (j) under coverages D, E, E-1, G, H, I and J, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;
- (k) under coverages D, E, E-1, G, H, I and J, to robes, wearing apparel or personal effects;
- (l) under coverages D, E, E-1, G, H, I and J, to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;
- (m) under coverages D and G, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment, lease, conditional sale, mortgage or other encumbrance;
- (n) under coverages E and E-1, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS.

The conditions, except conditions 1 to 19 inclusive, apply to all coverages. Conditions 1 to 19 inclusive apply only to the coverage or coverages noted thereunder.

1. **Notice of Accident.** When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.
Coverages A, B and C
2. **Notice of Claim or Suit.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
Coverages A and B
3. **Limits of Liability.** The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident. The limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.
Coverage A
4. **Limit of Liability.** The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.
Coverage C
5. **Limits of Liability.** The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.
Coverages A, B and C
6. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.
Coverages A and B
Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.
Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.
7. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.
Coverage C
8. **Financial Responsibility Laws.** Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.
Coverages A and B
9. **Assault and Battery.** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.
Coverages A and B
10. **Medical Reports; Proof and Payment of Claim.** As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.
Coverage C
The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

11. **Named Insured's Duties When Loss Occurs.** When loss occurs, the named insured shall
Coverages D, E, E-1, F, G, H, I and J
 - (a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy, reasonable expense incurred in according such protection shall be deemed incurred at the company's request;
 - (b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;
 - (c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.
 Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.
12. **Appraisal.** If the named insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the D, E, E-1, appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, F, G, H, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company, such umpire I and J shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.
The company shall not be held to have waived any of its rights by any act relating to appraisal.
13. **Limit of Liability; Settlement Options; No Abandonment.** The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss nor what it would cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.
Coverages D, E, E-1, F, G, H and I

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.



14. Payment for Loss; Action Against Company. Coverages D, E, E-1, F, G, H, I and J

No action shall lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

15. No Benefit to Bailee. The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee. Coverages D, E, E-1, F, G, H, I and J

16. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

17. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

18. Other Insurance. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

19. Other Insurance. The insurance afforded with respect to other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

20. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President, a Vice-President, Secretary or Assistant Secretary of the company.

21. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

22. Cancellation. This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

23. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

24. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, The ANCHOR CASUALTY COMPANY has caused this policy to be signed by its president and secretary or assistant secretary at Saint Paul, Minnesota, and countersigned on the declarations page by a duly authorized agent of the company.

G. Blomholm
SECRETARY.

Henry
PRESIDENT

Short Rate Cancellation Table			
For Term of One Year			
Cancellation of policies issued for a term exceeding one year shall be made on the basis of the following table:			
(a) When the policy has run for less than a year, the earned premium shall be computed short rate of the first year's premium;			
(b) When the policy has run over one year, the earned premium shall be the first year's premium plus pro rata of the annual premium for the second year.			
Days in Force	Per Cent to be Charged or Refund	Days in Force	Per Cent to be Charged or Refund
1	5	151-156	53
2	6	157-160	54
3	7	161-164	55
4	8	165-167	56
5	9	168-171	57
6	10	172-175	58
7	11	176-178	59
8	12	179-182	60
9	13	183-187	61
10	14	188-191	62
11	15	192-196	63
12	16	197-200	64
13	17	201-205	65
14	18	206-209	66
15	19	210-214	67
16	20	215-218	68
17	21	219-223	69
18	22	224-228	70
19	23	229-232	71
20	24	233-237	72
21	25	238-241	73
22	26	242-246	74
23	27	247-250	75
24	28	251-255	76
25	29	256-260	77
26	30	261-264	78
27	31	265-269	79
28	32	270-273	80
29	33	274-278	81
30	34	279-282	82
31	35	283-287	83
32	36	288-291	84
33	37	292-296	85
34	38	297-301	86
35	39	302-305	87
36	40	306-310	88
37	41	311-314	89
38	42	315-319	90
39	43	320-323	91
40	44	324-328	92
41	45	329-332	93
42	46	333-337	94
43	47	338-342	95
44	48	343-346	96
45	49	347-351	97
46	50	352-355	98
47	51	356-360	99
48	52	361-365	100

ANCHOR

CASUALTY COMPANY

A STOCK COMPANY

ST. PAUL, MINNESOTA

Automobile Combination Policy

AUTOMOBILE

No. AS 7924

Issued to

INLAND MOTOR FREIGHT, INC.

ET AL

PORTLAND, OREGON

Expires APRIL 1, 1950

At twelve and one minute o'clock A. M.

ENDORSEMENT No. 1

Form B. M. 31
(Copy)

Form Approved Budget
Bureau No. 60-R093-42

Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability, and Property Damage Liability, Under Section 215, Interstate Commerce Act

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to assure compliance by the insured as a motor carrier of passengers or property, with section 215 of the Interstate Commerce Act, and the pertinent rules and regulations of the Interstate Commerce Commission.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay any final judgment recovered against the insured for bodily injury to or the death of any person or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and loss of or damage to property of the insured, and property transported by the insured, designated as cargo), resulting from the negligent operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the insured by the Interstate Commerce Commission, or otherwise under Part II of the Interstate Com-

merce Act, within the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and agreed that upon failure of the Company to pay any such final judgment recovered against the insured, the judgment creditor may maintain an action in any court of competent jurisdiction against the Company to compel such payment. The bankruptcy or insolvency of the insured shall not relieve the Company of any of its obligations hereunder. The liability of the Company extends to such losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the insured or elsewhere, except as follows:

(Name as exceptions only States in which the insured's operations are covered by other insurance): No Exceptions.

The liability of the Company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder:

Schedule of Limits

Motor Carriers—Bodily Injury Liability—
Property Damage Liability

(1)	(2)	(3)	(4)
Kind of equipment	Limit for bodily injuries to or death of one person	Limit for bodily injuries to or death of all per- sons injured or killed in any one accident (subject to a maximum of \$5,000 for bodily injuries to or death of one person)	Limit for loss or damage in any one accident to property of others (excluding cargo)
Passenger Equipment (seating capacity)			
Seven passengers or less.....	\$5,000	\$15,000	\$1,000
8 to 12 passengers, inclusive.....	5,000	20,000	1,000
13 to 20 passengers, inclusive.....	5,000	30,000	1,000
21 to 30 passengers, inclusive.....	5,000	40,000	1,000
31 passengers or more.....	5,000	50,000	1,000
Freight Equipment			
All motor vehicles used in the transportation of property.....	\$5,000	\$10,000	\$1,000

Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment.

The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

This endorsement may not be canceled without

cancelation of the policy to which it is attached. Such cancelation may be effected by the Company or the insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D. C., said thirty (30) days' notice to commence to run from the date notice is actually received at the office of said Commission.

Attached to and forming part of policy No. AS 793494, issued by the Anchor Casualty Company (herein called Company) of St. Paul, Minnesota to Pacific Highway Transport, Inc., of Seattle, Wash.

Dated at Seattle, Wash., this 5th day of April, 1949.

Countersigned by:

.....,

Authorized Company
Representative.

W.C. 2057A F. 176

Endorsement No. 2

[Endorsement No. 2 is identical to the foregoing Endorsement No. 1, excepting that it is attached to Policy No. 793494, issued to Inland Motor Freight, Inc., of Spokane, Washington.]

Endorsement No. 3

(Copy)

Oregon Public Utilities Commissioner

Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability and Property Damage Liability—Automatic Coverage

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to assure compliance by the named insured, as a motor carrier of passengers or property with appropriate provisions of the Motor Transportation Act of Oregon, as amended, and the pertinent rules and regulations of the Commissioner of Public Utilities of Oregon, promulgated in accordance with the provisions of the Motor Transportation Act of Oregon.

In consideration of the premium stated in the policy to which this endorsement is attached, or becomes a part, when duly countersigned, the company hereby agrees to pay any final judgment recovered against the named insured for bodily injury to or the death of any persons or loss of or damage to property of others (excluding injury to or death of the named insured's employees while engaged in the course of their employment, and loss of or damage to property owned or operated by or in the care, custody or control of the named insured, and property transported by the named insured, designated as cargo, and to any obligation

for which the named insured may be held liable under any Workmen's Compensation Law), resulting from the negligent operation, maintenance, ownership, or use of motor vehicles under permit issued to the named insured by the Commissioner of Public Utilities of Oregon, or otherwise under the Oregon Motor Transportation Act, within the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and agreed that upon failure of the company to pay any such final judgment recovered against the named insured, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment. The bankruptcy or insolvency of the named insured shall not relieve the company of any of its obligations hereunder. The liability of the company extends to such losses, damages, injuries or deaths whether occurring on the route or in the territory authorized to be served by the named insured or elsewhere, within the State of Oregon, but as respects this endorsement only while operating under the provisions of the Motor Transportation Act of Oregon.

The liability of the company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder, in the following minimum amounts:

Type of Motor Vehicle	Bodily Injury Limit for Each Person	Liability Limit for Each Accident	Property Damage Liability Limit for Each Accident
Each motor vehicle authorized for use in the transportation of property....	\$5,000	\$10,000	\$5,000
Each motor vehicle authorized for use in the transportation of persons, having passenger seating capacities as follows:			
12 passengers or less.....	5,000	10,000	5,000
13 to 20 passengers.....	5,000	15,000	5,000
20 passengers or more.....	5,000	20,000	5,000

Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the named insured, shall relieve the company from liability hereunder or from the payment of any such final judgment, but as respects any equipment of the named insured while being operated by others under an interchange of equipment agreement or requirement, the insurance afforded by this policy shall be excess over any other valid and collectible insurance available to the named insured.

In consideration of the attachment of this endorsement, it is agreed that any provision in the policy to which this endorsement is attached extending the benefits of this insurance to any person, firm or corporation other than the insured named therein is hereby declared null and void and in lieu thereof it is agreed that the unqualified words "named insured" wherever used in this endorsement include the named insured, his or its employees while acting within the scope of such employment and also any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such.

The named insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Cancellation of this endorsement or of the policy to which it is attached may be effected by the company or the named insured giving not less than 15 days' notice in writing to the Commissioner of Public Utilities of Oregon at his office in Salem, Oregon, said notice to commence to run from the date notice is actually received at the office of said Commissioner.

Attached to and forming part of Policy No. AS 793494 issued by the Anchor Casualty Company (herein called company) of St. Paul, Minnesota, to Pacific Highway Transport, Inc., and Inland Motor Freight, et al., of Portland Oregon.

Dated at Portland, Oregon, this 5th day of April, 1949.

Countersigned by.....,
Authorized Company
Representative.

Form No. MP-943.1

Endorsement No. 4

Z-44

(Copy)

Standard Form of Endorsement Prescribed by the
Department of Transportation of Washington

To Be Attached to and Made a Part of All Policies
Insuring Motor Freight Carriers Subject to
Regulation by the Department of Transporta-
tion of Washington

(Form MV 1)

(Supersedes all endorsements heretofore required
by said Department)

The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy, and is hereby amended to assure compliance by the insured, as a motor carrier of property with appropriate provisions of law (Chapter 184, Laws of 1935 and acts amendatory thereof and supplemental thereto); and with the pertinent rules, orders and regulations of the Department of Transportation of Washington.

In consideration of the premium provided for in the policy of which this endorsement is made a part the Company agrees that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the ownership, maintenance or use of any vehicle

operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy; that the judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment; that the right of any person, firm or corporation to recover under the policy shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard to any warranty, condition, declaration, or provision of the policy; and that the policy shall remain in full force and effect notwithstanding such act, omission or misrepresentation or the violation of any warranty, condition, declaration or provision of the policy by the insured or his employees: Provided, however, That this endorsement shall not be construed to impose any obligation on the Company for which it would not be liable independently hereof with respect to (1) bodily injuries to or death of employees of the named insured arising out of or in the course of their employment, (2) bodily injuries to or death of any person occurring while such person is riding in or upon or entering or alighting from any vehicle covered by the policy, (3) loss of or damage to property owned by, rented to, in charge of, or transported by the insured, or (4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes. The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of

the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

The Company further agrees that such insurance as is afforded by the policy and this endorsement against liability for injuries to or death of persons and damage to or destruction of property shall not be cancelled, rescinded, or suspended, nor shall the cancellation, rescission, or suspension of the policy or of this endorsement take effect, nor shall the policy or this endorsement become void for any reason whatsoever, except by the expiration of the term for which it is written, until the Company shall have first given fifteen days' notice in writing to the Department of Transportation of Washington at its office, Insurance Building, Olympia, Washington, said fifteen days' notice to commence from the time notice is actually received by the Department.

The Company further agrees that if the policy shall be cancelled or suspended or otherwise terminated, and shall thereafter be reinstated, notice in writing of such reinstatement shall immediately be given by the Company to the Department of Transportation at its said office.

The Company further agrees that this endorsement shall prevail over any conflicting provision in the policy or in any other endorsement now or hereafter attached thereto or made a part thereof: Provided, however, That this endorsement shall be of no effect with respect to any liability in excess

of \$5,000.00 for bodily injuries to or death of any one person and \$10,000.00 for bodily injuries to or death of two or more persons in any one accident, and \$5,000.00 for damage to or destruction of property of one or more than one claimant in any one accident.

Nothing in this endorsement shall be construed to limit or restrict any coverage otherwise provided by the policy of which this endorsement is made a part.

When countersigned by an authorized representative of the Company this endorsement becomes a part of Policy No. AS 793494 issued by Anchor Casualty Company (herein called Company) of St. Paul, Minnesota, to Inland Motor Freight, Inc., effective April 1, 1949, at 12:01 a.m., standard time at the address of the insured as stated in said policy.

Countersigned at Seattle, Wash., this 5th day of April, 1949.

By,
Authorized Company
Representative.

Endorsement No. 5

[Endorsement No. 5, is identical to the foregoing Endorsement No. 4, excepting that it is attached to Policy No. AS 973494 issued to Pacific Highway Transport, Inc.]

Endorsement No. 6

(Copy)

Freight Carrying Vehicles Only.

Auto Transportation Companies

Policy Endorsement for Motor Propelled Vehicles
Transporting Property, and to Cover Public
Liability and Property Damage Only

The policy or bond to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Title 59, Chapter 8, Idaho Code Annotated, and all acts amendatory thereof or supplemental thereto, and the Rules and Regulations of the Public Utilities Commission of Idaho adopted thereunder. In consideration of the premium stated in the policy or bond to which this endorsement is attached, the insurer hereby waives the description of the motor propelled vehicle or motor propelled vehicles insured hereunder, and agrees to make compensation within the limits set out in this endorsement.

On each motor propelled vehicle used for the transportation of property:

Not to exceed \$5,000 for any recovery for personal injury to one person.

Not to exceed \$10,000 for any recovery for personal injury to all persons as a result of one accident.

Not to exceed \$5,000 for damage to the prop-

erty of any or all persons other than the insured as the result of any one accident.

For the purpose of this endorsement the term "motor propelled vehicle" or "motor propelled vehicles" shall be construed to include said motor propelled vehicles, trailers and other equipment.

All conditions and provisions of the policy or bond to which this endorsement is attached and any statements or agreements contained therein or endorsed thereon in conflict with this rider are by agreement of all parties hereto held null and void insofar as they are in conflict herewith.

The policy or bond to which this endorsement is attached cannot be cancelled by the insurer, or by the insured without first giving thirty (30) days' written notice to the insured and to the Public Utilities Commission of Idaho. It is understood and agreed that the injury and/or damage covered by this policy or bond be limited to such injury and/or damage occurring while operating under the terms of a permit issued by the Public Utilities Commission of the State of Idaho.

This endorsement shall become effective on the 1st day of April, 1949, at 12:01 Standard Time, at the insured's address as set forth in the statement of the above policy.

Attached to and forming a part of Policy No. AS 793494 issued by Anchor Casualty Company to Inland Motor Freight, Inc.

Witness the execution hereof this 5th day of April, 1949, at Seattle, Washington.

.....,
Insurer.

.....,
Agent.

Endorsement No. 7

In consideration of the premium at which this policy is written, it is agreed that such insurance as is afforded by this policy for Bodily Injury Liability and Property Damage Liability applies to the following provisions:

1. Application of Insurance. This insurance applies to automotive equipment owned or operated by the Insured during the policy period.

2. Premiums. The named insured shall pay to the Company at the effective date of the policy a deposit premium of \$4,500.00 (\$2,169.00 Bodily Injury and \$2,331.00 Property Damage).

The earned premium shall be computed and paid monthly by applying to the gross receipts, as hereinafter defined, the rate of \$.90 (\$.434 B. I. and \$.466 P. D.) for the Inland Motor Freight, Inc., and the rate of \$1.35 (\$.651 B. I., and \$.699 P. D.) for the Pacific Highway Transport, Inc. The deposit premium shall be applied to the earned premium for the last month of the policy period as computed above. Should said deposit premium ex-

ceed the last monthly earned premium, the Company shall immediately refund the difference to the named insured, and, should the last monthly earned premium exceed the deposit premium, the difference shall be immediately payable to the Company.

3. Gross Receipts Defined. The term "Gross Receipts" as used herein, shall mean the total gross revenue, before deduction of any charges or expense, and regardless of whether such revenue is collected or not, accruing from the operation or use of automotive equipment in the business operations of the named insured.

4. Inspection. The Company shall be permitted to inspect at all reasonable times during the policy period the named Insured's Automobiles and to examine and audit at all reasonable times during the policy period, and within one year after the expiration thereof, the named insured's records so far as such records relate to the subject matter of this insurance. The Company waives no rights and assumes no responsibility by reason of such inspection or examination or the omission thereof.

Effective Date of this Endorsement April 1, 1949.

Subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy.

Policy No. AS 793494, issued to Inland Motor Freight, Inc., et al., of Portland, Oregon.

Countersigned at Portland, Oregon, this 5th day of April, 1949.

**ANCHOR CASUALTY
COMPANY,**

/s/ HENRY GUTHUNZ,
President.

Form 10 4M 5-49

Endorsement No. 8

In consideration of the premium at which this policy is written, it is agreed that the following companies shall be considered as additional Assureds as respects the operations of the Named Insured which involves transporting commodities for, or for the account of the following named concerns:

Great Northern Railway Company,
Northern Pacific Railway Company,
Chicago, Milwaukee, St. Paul & Pacific
Railroad Company,
Oregon Washington Railway & Navigation
Company.

Nothing contained herein, however shall be construed to provide coverage for any operations of the above named concerns or equipment owned or operated by those concerns.

Effective Date of this Endorsement April 1, 1949.

Subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy.

Policy No. AS 793494, issued to Inland Motor Freight, Inc., et al., of Portland, Oregon.

Countersigned at Portland, Oregon, this 5th day of April, 1949.

ANCHOR CASUALTY
COMPANY,

/s/ HENRY GUTHUNZ,
President.

Form 10 4M 5-49

Endorsement No. 9

Deductible Property Damage Liability Applicable
Only to Commercial Type Automobiles

It is agreed that such insurance as is afforded by the policy for Property Damage Liability applies subject to the following provisions:

1. \$50.00 shall be deducted from the total amount of all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages on account of each accident, and the company shall be liable only for the difference between such deductible amount and the limit of the company's liability for each accident as stated in the policy.

2. The terms of the policy, including those with respect to notice of accident and the company's right to investigate, negotiate and settle any claim or suit, apply irrespective of the application of the deductible amount.

3. The company may pay any part or all of the deductible amount to effect settlement of any claim or suit, and upon notification of the action taken, the named insured shall promptly reimburse the company for such part of the deductible amount as has been paid by the company.

Subject in all other respects to all the agreements, general conditions, and special conditions of this policy. This endorsement, when countersigned by a duly authorized officer or representative of the Company and attached to Policy No. AS 793494, issued to Inland Motor Freight, Inc., et al., of Portland, Oregon.

Countersigned at Portland, Oregon, this 5th day of April, 1949.

ANCHOR CASUALTY
COMPANY,

/s/ HENRY GUTHUNZ,
President.

Service admitted.

[Endorsed]: Filed March 12, 1951.

Form 10 4M 5-49

[Title of District Court and Cause.]

ANSWER

Comes now defendants herein named and answers Complaint of plaintiff as follows:

I.

Defendants admit Paragraph I of plaintiff's Complaint.

II.

Defendants admit Paragraph II of plaintiff's Complaint.

III.

Defendants admit Paragraph III of plaintiff's Complaint.

IV.

Defendants deny Paragraph IV of plaintiff's Complaint.

For further answer and by way of affirmative defense, defendants allege as follows:

I.

That after the issuance of the insurance policy in April of 1949 as alleged in Paragraph III of plaintiff's complaint, and prior to the cancellation thereof, plaintiff told and advised defendants that the premium rates on said policy would have to be increased materially and that defendants would have to agree to said increase in rates to be effective from and after June 1st, 1949, and, in the alternative, in the event they declined to agree to said increased rates, that defendants and each of them

should seek and obtain other insurance coverage and that the said policy of April 1st, 1949, would be cancelled.

II.

That thereafter defendants did obtain other insurance coverage, whereupon the said policy of insurance from plaintiff was cancelled.

III.

That neither of defendants were advised in any manner either at the issuance of the policy of insurance of April, 1949, or at any time thereafter, that there was any penalty in connection with its cancellation by either party.

IV.

That defendants have paid to plaintiff all sums due in connection with said policy of insurance with plaintiff.

Wherefore, Defendants pray and demand that plaintiff's Complaint be dismissed and that they take nothing thereby, and that defendants have their costs herein expended.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 12, 1951.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and replies to the answer on file herein, as follows:

I.

Denies each and every affirmative allegation contained in the first affirmative defense.

Wherefore, plaintiff prays judgment against the defendants as asked in the complaint.

WITHERSPOON,

WITHERSPOON & KELLEY,

/s/ WILLIAM V. KELLEY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 12, 1951.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER RULE No. 36

Comes now the plaintiff pursuant to provisions of Rule No. 36 of the Rules of Civil Procedure, and requests the admission by the defendants of the truth of the following relevant matters of fact:

I.

That the policy of the Anchor Casualty Company involved in this case, copy of which is set

forth in plaintiff's voluntary Bill of Particulars, was in force for a period of sixty-one (61) days from April 1, 1949.

II.

That the gross receipts of the defendant Inland Motor Freight, Inc., for said period was \$456,-650.61, and the gross receipts of the defendant Pacific Highway Transport, Inc., was \$311,848.46 as testified to by the President of said defendant companies, Gus H. Nieman, pursuant to his deposition of March 26, 1951.

III.

That said defendants cancelled said policy, cancellation to be effective June 1, 1949, and that said cancellation was given to John Nelson of Bryan-Nelson Agency, Spokane, Washington.

IV.

That plaintiff's Exhibit "A" attached to said deposition of said Gus H. Nieman, being a copy of the pay roll auditor's report of Anchor Casualty Company, is a correct and true copy of the amounts making up the claimed earned premium of \$13,-441.24 as set forth in Paragraph IV of plaintiff's complaint and as taken from the books and records of the defendants.

WITHERSPOON,

WITHERSPOON & KELLEY,

/s/ WM. V. KELLEY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 3, 1951.

[Title of District Court and Cause.]

ADMISSION OF FACTS AS REQUESTED
BY PLAINTIFF

Comes Now the defendants and each of them herein, and pursuant to request for admission of certain facts, as served upon defendants by plaintiff, and admits to the truth of the matters stated as follows:

I.

Admits the truth of the matter stated in Paragraph I of Plaintiff's request.

II.

Admits the truth of the matter stated in Paragraph II thereof.

III.

Admits the truth of the matter stated in Paragraph III thereof.

IV.

Admits the gross receipts as set forth on said Exhibit A and admits the arithmetical correctness in the computation set forth thereon, but denies the correctness of plaintiff's theory and manner of computation and denies that there was earned premium of \$13,441.24, or in any other sum in excess of \$8,319.84, which amount has already been paid by these defendants.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 3, 1951.

[Title of District Court and Cause.]

NOTICE OF FILING DEPOSITION

To the above-named defendants, and to Brown & Brown and Robert M. Brown, your attorneys:

You are notified that in accordance with the stipulation of the parties, the deposition of Gus Nieman of Spokane, Washington, was taken before Mr. Stanley D. Taylor, court reporter of the above-entitled court, at 1114 Old National Bank Building, Spokane, Washington, upon oral interrogatories. Said deposition was taken March 26, 1951, and was filed with the clerk of this court on March 27, 1951.

Dated this 27th day of March, 1951.

WITHERSPOON,

WITHERSPOON & KELLEY,

/s/ WILLIAM V. KELLEY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 28, 1951.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Anchor Casualty Company, and moves the Court for a summary judgment in the above-entitled case pursuant to the provisions of Rule 56 of the Rules of Civil Procedure.

This motion is based upon exhibits on file, pleadings herein and the deposition of Gus H. Nieman taken March 26, 1951, at 2:30 o'clock p.m. at 1114 Old National Bank Building, Spokane, Washington, before Stanley D. Taylor, Notary Public in and for the State of Washington, in the above-entitled cause.

WITHERSPOON,

WITHERSPOON & KELLEY,

/s/ WM. V. KELLEY,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 3, 1951.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes Now defendants above named and each of them and move for summary judgment dismissing complaint of plaintiff in the above-entitled matter.

This Motion is based upon pleadings on file herein and Stipulation and Admission of Facts on file herein, and the deposition of Gus H. Nieman, taken on March 26, 1951, and on file herein.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 3, 1951.

[Title of District Court and Cause.]

STIPULATION

The parties herein, through their respective attorneys, stipulate with respect to Paragraph IV of the complaint and Paragraph IV of the answer that the gross receipts of the defendant, Inland Motor Freight, Inc., during the alleged 61-day period was the sum of \$456,651.61; that under the plaintiff's theory upon said sum the aggregate earned premium at the rate so specified would amount to \$4109.85, and upon which the short rate penalty, if due, pursuant to cancellation would amount to \$2529.91; that the gross receipts of Pacific Highway Transport, Inc., during the alleged 61 days was \$311,848.46, upon which sum, under the plaintiff's theory, the earned premium would be, at the rate specified in said policy, \$4209.95, and upon which the short rate penalty for cancellation, if applicable, would amount to \$2591.53; that the total of said premiums and short rate penalties under the plaintiff's theory would be \$13,441.24 earned and becoming due the plaintiff under said policy; that defendants have paid the sum of \$8319.84 to plaintiff and that, if plaintiff's theory is correct, there would be a balance due and owing plaintiff of \$5121.40, together with interest thereon at the rate of 6% per annum from June 1, 1949, to the date of judgment herein.

It is further stipulated that defendants deny that there is any sum or sums owing plaintiff and that

this stipulation is not to be construed as an admission of any liability whatsoever by the defendants, and is entered into for the convenience of the Court and to save expense to the respective parties in the production of the records of the defendant Inland Motor Freight, Inc., which indicate for said 61-day period gross receipts of \$456,651.61, and the records of the Pacific Highway Transport, Inc., which reflect for the same period gross receipts of \$311,848.46.

Dated this 30th day of April, 1951.

WITHERSPOON,

WITHERSPOON & KELLEY,

/s/ WILLIAM V. KELLEY,

Attorneys for Plaintiff.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Defendants.

[Endorsed]: Filed May 5, 1951.

[Title of District Court and Cause.]

OPINION OF THE COURT

Plaintiff filed a motion for summary judgment and, on the same day, defendants filed a similar motion. The motions are based upon the pleadings, a stipulation of the parties, admissions of the defendants under Rule 36, and the deposition of the

individual who is the president of each of defendant corporations. From such sources the following undisputed facts appear:

On April 1, 1949, defendants were engaged in the operation of freight lines for the transportation of freight by motor trucks. Their motor vehicles were insured against property damage and bodily injury liability by plaintiff. The insurance policies ran for periods of one year and were renewed annually. The last policy, which ran from April 1, 1949, to April 1, 1950, was written on a printed form to which a number of endorsements were attached. One typed endorsement recited that the earned premium should be computed and paid monthly by applying to the gross receipts as therein defined the rate of \$.90 for defendants Inland Motor Freight, Inc., and \$1.35 for defendant Pacific Highway Transport, Inc. The endorsement stated that it was "Subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy."

On the last page of the policy, a section in print, headed "Cancellation" provided that:

"This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. . . .

“If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata.”

Also, on the last page and following the text of the policy there was a table headed “Short Rate Cancellation Table—For Term of One year.” According to the table, 27 per cent was to be charged or retained when the policy had been in force 61 days.

The policy was canceled by defendants, the named insured, June 1, 1949, after it has been in force for 61 days. During that period the gross earnings of defendant Inland Motor Freight, Inc., was \$456,650.61 and the earned premium computed at the rate specified in the typed endorsement, mentioned above, was \$4,109.85. The gross earnings of defendant Pacific Highway Transport, Inc., for the 61-day period, was \$311,848.46, and the earned premium, \$4,209.95. Defendants have paid plaintiff the earned premiums in the amounts just stated. The question to be determined is whether defendants, because of their cancellation of the policy, should be charged according to its short rate cancellation provisions—that is to say, 27 per cent of the annual premium. Plaintiff contends that the short rate should be applied and that it should be computed by dividing the earned premium for the 61-day period by 61; then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum. By that

method of computation the unpaid balance of the premium—that is to say, the short rate premium less the amount paid—would be \$2,529.91 for defendant Inland Motor Freight, Inc., and \$2,591.53 for defendant Pacific Highway Transport, Inc.

Defendants contend that the endorsement providing for payment of monthly premiums on the basis of percentage of gross receipts is inconsistent with the short rate provisions of the policy, and creates an ambiguity which, according to well recognized rules of construction, should be construed against the insurer. They further assert that, since only 61 days of the policy period had elapsed at the time of cancellation and the amount of the annual premium could not then be ascertained, there was no basis for computation of the short rate of 27 per cent of the annual premium.

I cannot agree that there is any ambiguity in the policy. The provisions as to earned premiums and short rate on cancellation can both be enforced in accordance with established precedents hereinafter cited, if the parties to the insurance contract so intended. And there is nothing in the earned premium endorsement to indicate that the parties intended to nullify the provision for payment of a special short rate premium on cancellation of the policy by the insured. On the contrary, the endorsement specifically provides that it is subject “in all other respects” to the conditions and terms of the policy.

The provision for payment of monthly premiums did not change the policy from an annual to a

monthly contract. And it was not, as defendants' president testified in his deposition "a continuous policy" of insurance. The policy is complete in itself. It does not by its terms incorporate any portion of any other instrument or refer to any prior policy. The period is expressly stated to be one year.

The same endorsement which provided for monthly premiums, required the insured to pay a deposit premium of \$4,500.00 to be applied to the earned premium "for the last month of the policy period as computed above." On June 1, 1949, the policy was a valid and subsisting contract which by its terms would have expired on April 1, 1950. The right of cancellation which defendants exercised was derived from the insurance contract and their premium liability upon cancellation must be measured by the same instrument.¹

Provisions in insurance policies for higher short rate premiums upon cancellation by the insured have been upheld by the courts in cases such as the instant one where the computation of premiums is based upon the pay roll or gross receipts of the insured for a definite period.²

¹Port Iron & Supply Co. v. Moore, 153 S. W. (2d) 319.

²Aetna Life Ins. Co. v. American Zinc Lead & Smelting Co., 154 S. W. 827; Aetna Life Ins. Co. v. Kansas City Electric Light Co., 171 S. W. 580; Big Run Coal Co. v. Employers Indemnity Co., 174 S. W. 25; Joseph Weaver & Son v. Home Life & Accident Co., 221 S. W. 299; Maryland Cas. Co. v. Boise Street Car Co., 11 P. (2d) 1090.

Moreover, the method of computation of the short rate premium contended for by plaintiff as stated above—that is to say, the approximation of the insured's actual earnings for the policy period year, by obtaining the average daily gross receipts for the period the policy was in effect, and multiplying such average amount by 365—has been sanctioned.³

Plaintiff's motion for summary judgment will be granted.

/s/ SAM M. DRIVER,

United States District Judge.

Copies mailed counsel, West Publishing Company, and The Attorney General, June 19, 1951.

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

ORDER

This matter coming on duly and regularly for hearing this 3rd day of May, 1951, the plaintiff, Anchor Casualty Company, a corporation, appearing by its attorney, William V. Kelley of Witherspoon, Witherspoon and Kelley, and the defendants, Inland Motor Freight, Inc., a corporation, and Pacific Highway Transport, Inc., a corporation, appearing by their attorney, Robert M. Brown of Brown & Brown, on plaintiff's motion for Sum-

³See cases cited in footnote 2.

mary Judgment, and upon a similar motion filed by the defendants, both motions being based upon the pleadings, a stipulation of the parties, admission of the defendants under Rule 36 and the deposition of Gus Nieman who is the president of each defendant corporation, and the Court having requested briefs of both parties and having taken the matter under advisement, and having filed a Memorandum Opinion herein on June 18, 1951, and being fully advised in the premises,

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the motion for Summary Judgment of plaintiff, Anchor Casualty Company, a corporation, be granted and that the motions for Summary Judgment of the defendants Inland Motor Freight, Inc., a corporation, and Pacific Highway Transport, Inc., be and the same are hereby denied, with an exception allowed to each defendant.

Done by the Court this 21st day of July, 1951.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ WILLIAM V. KELLEY,
Attorney for Plaintiff.

Notice of Presentment of the above-entitled Order is hereby waived.

.....,
Attorney for Defendants.

[Endorsed]: Filed July 21, 1951.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

Civil Action No. 906

SUMMARY JUDGMENT

ANCHOR CASUALTY COMPANY, a Corpora-
tion,

Plaintiff,

vs.

INLAND MOTOR FREIGHT, INC., a Corpora-
tion, and PACIFIC HIGHWAY TRANS-
PORT, INC., a Corporation,

Defendants.

The above matter came on for hearing on applica-
tion of plaintiff, Anchor Casualty Company, a
corporation, for summary judgment against the
defendants, Inland Motor Freight, Inc., a corpora-
tion, and Pacific Highway Transport, Inc., a cor-
poration, and it appears that both plaintiff and
defendants had hitherto made separate motions for
summary judgments and the Court having hitherto
granted the motion for summary judgment made by
plaintiff Anchor Casualty Company, a corporation,
and denied the motion for summary judgment on
behalf of defendant corporations as shown by the
order entered in the above-entitled cause on July
21, 1951,

Now, Therefore, by reason of the law and the

premises, It Is Ordered, Adjudged and Decreed that the Anchor Casualty Company, a corporation, have judgment against the defendants Inland Motor Freight, Inc., a corporation, and Pacific Highway Transport, Inc., a corporation, for the sum of \$5,121.40 together with interest thereon at the rate of six per cent (6%) per annum from June 1, 1949, until this judgment is paid.

Done in Open Court this 30th day of July, 1951.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ W. V. KELLEY,

Approved by:

/s/ L. W. THAYER, of
BROWN & BROWN.

[Endorsed]: Filed July 30, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Inland Motor Freight, Inc., a corporation, and Pacific Highway Transport, Inc., a corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 30th day of July, 1951.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Appellants, Inland Motor Freight, Inc., a Corporation, Pacific Highway Transport, Inc., a Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 28, 1951.

[Title of District Court and Cause.]

STIPULATION

The parties herein stipulate, through their respective counsel, that the oral examination of Gus Nieman, President and Officer of the above-entitled corporate defendants, may be had before Stanley D. Taylor, court reporter, at 2:30 o'clock p.m. on Monday, March 26, 1951, at 1114 Old National Bank Building, Spokane, Washington, and that if not completed on said date may be continued to a date mutually convenient to the parties without

plaintiff waiving its right to inspect and subpoena all contracts, letters, memoranda and other data concerning that certain insurance policy referred to in Paragraph III of plaintiff's complaint.

Dated this 23rd day of March, 1951.

WILLIAM V. KELLEY,
WITHERSPOON,
WITHERSPOON & KELLEY,
Attorneys for Plaintiff.

/s/ ROBERT M. BROWN,
BROWN & BROWN,
Attorneys for Defendants.

United States District Court, Eastern District of
Washington, Northern Division

Civil No. 906

ANCHOR CASUALTY COMPANY, a Corpora-
tion,

Plaintiff,

vs.

INLAND MOTOR FREIGHT, INC., a Corpora-
tion, and PACIFIC HIGHWAY TRANS-
PORT, INC., a Corporation,

Defendants.

DEPOSITION OF GUS H. NIEMAN

Be It Remembered that pursuant to the attached stipulation the above-entitled matter came on at

(Deposition of Gus H. Nieman.)

1114 Old National Bank Building, Spokane, Washington, on Monday, the 26th day of March, 1951, at 2:30 o'clock p.m. for the taking of the deposition upon oral examination of Gus H. Nieman.

Present and representing the plaintiff was William V. Kelley, of Witherspoon, Witherspoon & Kelley, attorneys at law, Spokane, Washington; present and representing the defendants was Robert M. Brown, of Brown & Brown, attorneys at law, Spokane, Washington.

After the witness Gus H. Nieman was sworn by Stanley D. Taylor, Notary Public in and for the State of Washington, to tell the truth, the whole truth and nothing but the truth in this proceeding, the following testimony was taken and the following proceedings were had, to wit:

Examination

By Mr. Kelley:

Q. What is your name?

A. Gus H. Nieman.

Q. And what position do you hold in the Inland Motor Freight, Inc.?

A. I'm president.

Q. And what position do you hold in the Pacific Highway Transport, Inc.?

A. President.

Q. And how long have you been president of those two organizations?

A. Since April, 1947.

Q. Directing your attention to this Anchor Casualty Company policy involved in this case, that

(Deposition of Gus H. Nieman.)

policy was in force a period of sixty-one days from April 1, 1949, was it?

A. I never really knew the anniversary date of the policy.

Q. I see. Can I take a look at your copy, Bob?

Mr. Brown: It's the same thing.

Q. (By Mr. Kelley): Is that the correct policy period, do you think, from April 1, 1949, to April 1, 1950?

A. That's the date I see that's on there, so apparently that was it.

Q. Directing your attention to paragraph four of the plaintiff's complaint, which your answer has denied, Mr. [2*] Nieman, are the figures \$456,650.61 the correct amount of the gross receipts of the defendant Inland Motor Freight, Inc., during that sixty-one days that the policy was in effect?

A. I presume they're about correct.

Q. And are the figures correct of the gross receipts of the Pacific Highway Transport, Inc., in the sum of \$311,848.46 for the same period?

A. I believe they are. They sound correct.

Mr. Kelley: I suppose as far as that goes, Mr. Brown, I can get hold of an audit report and I can give it to you, and we can at least check that arithmetic so as to save time and trouble.

Mr. Brown: Yes. On the gross receipts I don't think there's any material dispute.

Q. (By Mr. Kelley): By the way, these figures could be ascertained to the penny, I suppose, by

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Gus H. Nieman.)

reference to your books? A. Yes, they could.

Q. When I say your books, I mean both the companies. A. Yes.

Q. Are they located in Spokane, Mr. Nieman?

A. The Inland Motor Freight books are located here; the Pacific Highway Transport are located on the coast. However, I would have those [3] figures.

Q. You'd have those figures? A. Yes.

Q. And who would have custody of the Inland Motor Freight books, who would be the individual?

A. Oney Riggs.

Q. And what position does he have with the company? A. Secretary-treasurer.

Q. And he's in Spokane? A. Yes.

Q. At the company's offices? A. Yes.

Q. Where are the company's offices? I've forgotten. A. 110 South Sheridan Street.

Q. And what's the situation with respect to the Pacific Highway Transport, Inc.?

A. Their offices are in Seattle, Sixth Avenue South and Holgate.

Q. And who would be the individual who had custody of those? A. Adolph Ness.

Q. I was informed that the individual who made up the report checked your books. Do you happen to know—in other words, I got my figures in this complaint from an auditor who is supposed to have checked your books. A. I think that's correct.

Q. The two company defendants in this case cancelled this [4] policy themselves, did they not?

(Deposition of Gus H. Nieman.)

A. I don't recall the exact transaction that took place regarding the cancellation. It all started because of a meeting I was called to in Seattle with Mr. Herb Gould of Gould & Gould, and there was myself and John Macdonald who is manager of Pacific Highway Transport, and John Nelson of Bryan & Nelson here, at that meeting when Mr. Gould informed us that because of our accident ratio that it was going to be necessary, that they were going to increase the premiums up to 50 per cent over what we were then paying, explaining to me that it wasn't the best type of insurance that they liked to carry, the risk was very great, and they didn't like to have to tell me that they were going to increase this insurance 50 per cent, knowing that it was quite a stiff amount, but told me that if I could find other coverage elsewhere I should do it, that they were not at all happy with this type of insurance; and it was then of course that I started looking around. I had looked around previous; in our business you're always looking for better deals, and after this meeting then I——

Q. Excuse me just a minute; about when was this meeting, do you recall?

A. Yes, it was about the latter part of January, I believe.

Q. Of what year? [5]

A. Of '48—wait a minute—'49 I believe was the year. The policy was cancelled in June, 1949. Yes. It was in the latter part of January or the first part of February, and so then realizing the situa-

(Deposition of Gus H. Nieman.)

tion being quite desperate, I really went out to look for some other coverage, and it was after I found this other coverage that I called Johnny Nelson on the phone and explained to him that I was going to cancel out June 1. I had no idea that the anniversary date of that policy was May, or I could have cancelled out sooner, and so he said "Well, that's all right, you mail me the policy," and I believe that's what I did, but I have no record of it.

Q. Let's see, who all were present at that meeting the latter part of January, 1949, or the first part of February?

A. John W. Macdonald, and of course myself, Johnny Nelson, and Herb Gould.

Q. And that was over in——

A. In Seattle. Johnny Nelson had called me one day and wanted to know when I was going to be in Seattle, that Herb Gould wanted to see me about this insurance, and I don't recall now what date that was, but I give him a date when I would be there, so Johnny said "Well, I'll be there and I'll meet you over there."

Q. Had you been carrying a similar type of insurance with [6] Gould & Gould?

A. We carried it all through Bryan & Nelson, who in turn I guess they sell it to Herb Gould and Gould. They broker it through them.

Q. Gould & Gould are sort of a wholesaler, so to speak?

A. Yes.

(Deposition of Gus H. Nieman.)

Q. Had you been covered by this Anchor Casualty Insurance Company for a number of years?

A. Several years. I don't recall exactly when we first went into Anchor, that is, when they put us in Anchor. I know that only three months previous to the time that I was called to Seattle we had another meeting over there, I was complaining about the high cost of the insurance, especially for the Pacific Highway Transport, and after doing a lot of talking regarding the matter they finally agreed to reduce my rate to 90 cents.

Q. The Pacific——

A. The Pacific Highway Transport, and then three months later they turned around and said they were going to increase it 50 per cent, and that's when they told me that they would suggest if I could find something better, to go get it.

Q. At this meeting you referred to the latter part of January or the early part of February, 1949, was anything said as to how the insurance policy was to be cancelled? [7] A. No.

Q. By the way, when you had that meeting did you in fact have coverage in the Anchor Casualty Company? A. Yes.

Q. Oh.

A. It was written with Anchor at that time.

Q. The reason I asked, I just noticed, for your own information, this policy goes from April 1, 1949, but I take it there was in force another policy?

A. Yes, there was an Anchor policy. The only

(Deposition of Gus H. Nieman.)

thing that I recall that was discussed regarding cancellation at that time was that they instructed or informed me that my rate would go up 50 per cent or they would have to cancel it.

Q. Well, was this increase of 50 per cent to take effect after the policy had expired?

A. Now, I couldn't say as to that because I didn't even know what the expiration date of the policy was. They just gave me 90 days, so that leads me to believe the meeting must have been the latter part of January, because they gave me 90 days to either pay this or find something else.

Q. What other insurance did you get?

A. We went in the Transport Indemnity.

Q. Isn't that the one that you or rather your company is [8] interested in forming?

A. Yes.

Q. Who all are in that?

A. Well, I couldn't tell you all the names. There's probably——

Mr. Brown: I'll object at this time as being not relevant to any issue in this case.

Mr. Kelley: By the way, I think you have a reservation under the rules anyway, as to the materiality, competency or relevancy, but I'll be glad to stipulate with you.

A. Shall I go ahead?

Q. Yes; he wanted to make that for the record.

A. There's at least 150 or more members in that; there may be three or four or five hundred, I don't know.

(Deposition of Gus H. Nieman.)

Q. Just to give me an idea, they're all truckers?

A. Yes, that's right.

Q. The nature of the Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., they're trucking corporations?

A. The Inland Motor Freight, by the way, is a corporation, not "Inc."

Q. Oh, is that right? It's Inland Motor Freight, a corporation? A. That's right.

Q. I see; well, do you remember the date when you got this [9] other coverage that you mention in the Transport—— A. Indemnity?

Q. Yes. A. June 1, 1949.

Q. Well, do you recall how this particular policy, that is, the Anchor Casualty Company policy, was cancelled? Was the policy surrendered manually?

A. I don't recall now. If it was, and it was in my file, and I surrendered it, it would have my own number that I put on it. I could identify it that way, because I number all my policies, then I know where they're at and what they're for. I haven't the policy. Apparently I surrendered it.

Q. By the way, did you ever cancel other insurance with this company, this Anchor Casualty Company? A. No.

Q. At the time that you cancelled the policy that's involved in this suit I suppose you noticed the short rate cancellation table?

A. No, I didn't know anything about it. It was my understanding it was a gross receipts policy and based on that alone.

(Deposition of Gus H. Nieman.)

Q. What was your understanding as to that?

A. It was a continuous policy, as far as I was concerned, renewed from year to year, and the only premiums was [10] based on the gross revenue earned each month.

Q. Well, when you went into this particular policy you didn't figure that you were just going to have it for 90 days, did you?

A. Well, I don't remember when we went into it. We went into it before I came to Spokane.

Q. Well, I say, when you went into it, whenever that was, you didn't just figure you were going to have coverage for 90 days?

A. It was my understanding at the time that there was no expiration date of the policy. I didn't understand that there was any expiration date on the policy.

Q. Well, did you understand that you were only going to be covered for 90 days, was that your notion?

A. I didn't even know the policy expired, had no idea when the policy expired or when or why.

Q. Who did you deal with or who sold it to you?

A. John Nelson.

Q. He's the only one?

A. Yes. I'm not sure whether I ever got a copy of that policy. I doubt it very much. I don't recall seeing it. It could be. As a say, if I got it, I would have a number up here and on the back side both.

Q. You mean on the outside?

A. Yes, I usually have one on both sides, fold

(Deposition of Gus H. Nieman.)

them up in my [11] file like this, and I have a number so whenever I run through them I can catch it on either side.

Q. That's only a copy of your own policy?

A. Yes.

Q. You'd put a number right on the——

A. I'd write it right up along in here.

Mr. Brown: Do you have the original of the policy?

Mr. Kelley: I don't have it here, no.

Q. (By Mr. Kelley): I've got a copy of a letter that you wrote to Mr. Herb Gould, Jr., under date of November 25, 1949. You may have, in your file there, you may have your own office copy. You can look for it if you want to, but directing your attention to that last sentence there in that letter, you speak about an understanding. What is that?

A. That was the conversation that I explained a while ago that we had up there in his office in January or it might have been the first part of February of 1949. That's what I was referring to, because nothing was ever mentioned at that time about any short term cancellation period or expiration date of the policy.

Q. Let me ask you this: Have you ever in the past with this company or any other company made a deal whereby the insurance company would go on the risk for only 90 days and then allow a full rate cancellation? [12]

A. Yes. In fact, I cancelled another policy at the same time when I cancelled this one, which

(Deposition of Gus H. Nieman.)

was also handled by Bryan & Nelson, to the D. K. McDonald Company which carried the cargo insurance, and they didn't give me any short term cancellation. It was the same type of policy, in that it was a gross receipts policy.

Q. Did it have a short term cancellation table on it, do you know? A. I don't know.

Q. What I was getting at, you know the cancellation clause always states it will be short rate, although you can contract otherwise?

A. Well, I can agree to that; that depends on the type of insurance. I never heard of it on this type of insurance, and we've written this type of insurance for years and years and years, in fact, for thirty some years we've bought this type of insurance, and this is my first experience on a short term cancellation, and we have cancelled before.

Q. You had cancelled before? A. Yes, sir.

Q. But not with this particular company?

A. Not with that particular company.

Q. In addition to D. K. McDonald, can you recall any other company? [13]

A. No, I can't, because it was quite a number of years previous to this.

Q. I think you said a moment ago you furnished the experience figures yourself on which this premium was based?

A. Not the experience figures; the gross receipts figures. They, however, were audited I believe by one of the insurance company auditors.

(Deposition of Gus H. Nieman.)

Q. Well, this policy that's involved here then is really a renewal of a previous insurance arrangement with the same company?

A. You mean Gould & Gould?

Q. Yes.

A. I presume that's what it was. It was a continuous policy until terminated.

Q. Well, when you went into this policy on or about April 1, 1949, did Gould & Gould, and more particularly Mr. Herbert Gould, Jr., definitely advise you and Bryan & Nelson, the agent, that at the end of 90 days if the experience was unprofitable that Anchor Casualty Company would have to cancel without further discussion, or what was the situation?

A. I don't think it was exactly like that.

Q. How do you recall?

A. The thing that brought the whole thing on, in December of 1948 we had a serious accident right out here on [14] Sunset Highway near the airport, and that was when they called us in for that meeting, and there wasn't anything mentioned about future experience. They were talking about experience as of now.

Q. Do you recall the date that you put your coverage—or I think you told me, June 1, 1949, is when you put it in this Transport Company?

A. Right. I could have just as well have made it May. If I had any idea that there was an expiration date on that policy at that time, I would have.

(Deposition of Gus H. Nieman.)

Q. I don't quite follow you on that; I don't believe I understand you.

A. Well, I didn't understand that the expiration date of this policy was May 1. In fact, I didn't have any idea when the expiration date of that policy was or that there was any expiration date at all. Had I known that, I could have put this transport idemnity company insurance in effect on May 1 just as well as June 1, and the only reason I let it run two more months as it was was to give Bryan & Nelson and Gould & Gould an opportunity—not to try to give them too big a shock too quick; that was the purpose of it.

Mr. Brown: Gus, why do you talk about May 1? I don't understand you on that myself.

A. Well, I should have said April 1 instead of May 1. I [15] didn't—in fact, I never knew until today that there was an April 1 expiration date on that policy, because nothing had ever been mentioned when we discussed it with Herb Gould there or with Johnny Nelson at any time that the expiration date of that policy was April 1.

Q. Well, was that meeting that you've mentioned the latter part of January or the first part of February, 1949, was that the only meeting you had with Gould & Gould?

A. No; we had a meeting about a year prior to that, when Mr. Gould said that we were going to have to do a better job as far as our accident ratio was concerned, and we did that spring hire

(Deposition of Gus H. Nieman.)

a safety director, and we had, for some unknown reason or other, we had a very good year, and then in the fall we had another meeting and I discussed the matter of getting a reduction, which he allowed me, and then right after that we had that accident, then he called me back in there to increase the rates 50 per cent.

Q. Well, the big difference between you and the company is that the company wants to cancel this short rate, and your position is that it should be cancelled on a pro-rate basis?

A. Well, my position is that there's no such thing as a short rate cancellation on a policy of this kind. It's written on a gross receipt basis, and when the end of the [16] month comes and I've got my total receipts, when I pay them off I'm all done. That was my understanding all the time.

Q. Well, at least now that this lawsuit has ensued, at least the difference between your positions is that you feel that the cancellation should not be short term——

A. Correct.

Q. ——whereas the company takes the opposite position.

Mr. Kelley: Mr. Brown, if I gave you a copy of the payroll auditor's report, then Mr. Nieman at his leisure and convenience could just pass it on, don't you think we could check the arithmetic and technically we could continue this until you determined in your own mind if this was right?

The Witness: I'll agree that the figures are right, the gross receipts figures. They're right.

(Deposition of Gus H. Nieman.)

Mr. Kelley: As I say, I haven't double checked this myself, and in fact I'm not going to.

Mr. Brown: They're so close, Bill, we wouldn't dispute them.

Mr. Kelley: Then what I was getting at, there would probably be no reason to subpoena your men or fuss around about the books?

Mr. Brown: No, not in the least.

Mr. Kelley: It's just the pure construction [17] of the contract, whether or not Mr. Nieman's position is correct or the company's is correct, that's about it.

Mr. Brown: I would like you to explain to me sometime, not now, your computation in arriving at the figures that you do as shown in the complaint.

Mr. Kelley: Well, suppose I do this; we can have this marked as a plaintiff's Exhibit A, and you can take it, and the computation is on there.

Mr. Brown: All right.

(Whereupon, copy of payroll auditors report was marked as Plaintiff's Exhibit "A" to this deposition.)

COPY

COPY

PAYROLL AUDITORS REPORT
ANCHOR CASUALTY COMPANY

SAINT PAUL, MINNESOTA

ASSURED INLAND MOTOR FREIGHT ET AL
ADDRESS 1001 - S. E. Water, Portland, Washington
LOCATIONS _____
POLICY NO. AB 793494 DEP. PREM. _____ MIN. PREM. _____ ENDORSEMENTS _____
AGENT _____
AUDIT PERIOD FROM 4-1 1949 TO 6-1 1949
EXPIRATION CANCELLATION X PERIODIC 8/R

CODES	CLASSIFICATIONS	RATES	PAYROLL ESTIMATED	PAYROLL FOR ADJUSTMENT	PREMIUM
	INLAND MOTOR FREIGHT				
	Gross Receipts				
	April 225,258.56				
	May 31 231,391.05				
	456,650.61				
	$456,650.61 \div \text{by } 61 \text{ days} = 7486.07 \times 365 = 2,732,415.55 \times .434 \text{ B. I. \& .466 P. D.}$				
	$= 11,858.68 \text{ B.I. \& } 12,733.05 \text{ P. D.} \times .27\%$				
			INLAND MOTOR FREIGHT		3201.84 B.I.
					3437.92 P.D.
	P. H. T.				
	Gross Receipts				
	April 151,555.57				
	May 160,292.89				
	311,848.46				
	$311,848.46 \div \text{by } 61 \text{ days} = 5112.27 \times 365 = 1865978.55 \times .651 \text{ B. I. \& .699 P. D.}$				
	$= 12147.52 \text{ B. I. \& } 13043.19 \text{ P. D.} \times .27\%$				
					3279.69 P. I.
					3521.66 P. D.

RECORDS EXAMINED - CASH BOOK GEN'L LEDGER PAYROLL BOOK CHECK STUBS O A B U. C TOTAL 13441.11
CONDITION OF RECORDS - GOOD FAIR POOR NONE

NAMES	DUTIES	SALARY	CODE	PREVIOUSLY BILLED
PRES.				* ADDITIONAL PREM
V. PRES.				* RETURN PREM
SEC.				
PARTNERS				

Pff. EX "A" to NIEMAN
DEPOSITION.
3-26-51
S.D.T.

(Deposition of Gus H. Nieman.)

Mr. Kelley: And if you find out, if you come to the conclusion that computation is correct, then we can agree that that's under the short rate theory, at least, that's how much would be owing. Of course, if it doesn't apply, why, nothing is. I'll hand this to Mr. Nieman.

Q. (By Mr. Kelley): Directing your attention to——

A. Yes, those figures are—the gross receipt figures are all right.

Mr. Kelley: Well, then, somebody can check the arithmetic; it won't be necessary for us to do that. With that understanding we can carry over, continue this finally until you've had a chance to do that. I haven't anything else to inquire about [18] today.

State of Washington,
County of Spokane—ss.

I, Stanley D. Taylor, United States Court Reporter and Notary Public in and for the State of Washington, and authorized to administer oaths by law of the State of Washington, do hereby certify:

That the within deposition of Gus H. Nieman was taken by me at 1114 Old National Bank Building, Spokane, Washington, on the 26th day of March, 1951; that the witness was first sworn to tell the truth, the whole truth and nothing but the truth; that the examination has been taken by me in shorthand and reduced to typewriting by me,

(Deposition of Gus H. Nieman.)

and that the within and foregoing, being typewritten sheets numbered 1 to 18 inclusive, exclusive of this page, is a true, accurate and complete transcript of the questions asked and of the answers given by said witness; that the submission to and signing of said transcribed deposition by the witness was waived.

In Witness Whereof I have hereunto set my hand and affixed my official seal this 27th day of March, 1951.

[Seal] /s/ STANLEY D. TAYLOR,

Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed May 3, 1951. [19]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the Original

Complaint.

Voluntary Bill of Particulars.

Answer.

Reply.

Request for Admissions under Rule 36.

Admissions of facts as requested by Plaintiff.

Notice of filing Deposition.

Deposition of Gus Nieman.

Plaintiff's Motion for Summary Judgment.

Defendant's Motion for Summary Judgment.

Stipulation dated April 30, 1951.

Opinion of the Court.

Order granting Plaintiff's Motion for Summary Judgment.

Summary Judgment.

Notice of Appeal.

Bond on Appeal.

Designation of Record.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in

the United States Court of Appeals for the Ninth Circuit, as called for by the Appellant in his designation of record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 5th day of October, A.D. 1951.

[Seal] /s/ A. A. LaFramboise,

Clerk of said District Court.

[Endorsed]: No. 13127. United States Court of Appeals for the Ninth Circuit. Inland Motor Freight, Inc., a Corporation and Pacific Highway Transport, Inc., a Corporation, Appellants, vs. Anchor Casualty Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed October 8, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13127

INLAND MOTOR FREIGHT, INC., a Corporation,
and PACIFIC HIGHWAY TRANSPORT, INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corporation,
tion,

Appellee.

STATEMENT OF POINTS

Come Now appellants above-named and set forth the following points upon which said appellants intend to rely: That the District Court of the United States for the Eastern District of Washington, Northern Division, erred in granting appellee's motion for summary judgment and in denying appellants' motion therefor, upon the following grounds:

I.

The short rate cancellation provision of the basic policy form here used was not applicable because the insurance contract was altered by endorsement as to premium and method of payment, and

II.

The short rate concellation provision of the basic policy form here used was not applicable here

because appellee requested and endorsed the cancellation of said policy.

BROWN & BROWN,

/s/ ROBERT M. BROWN,

Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 22, 1951.

United States
Court of Appeals
For the Ninth Circuit

INLAND MOTOR FREIGHT, INC., a Corporation,
and PACIFIC HIGHWAY TRANSPORT, INC., a
Corporation,

Appellants,

VS.

ANCHOR CASUALTY COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANTS

*Appeal from the United States District Court for the
Eastern District of Washington,
Northern Division.*

BROWN & BROWN
Attorneys for Appellants
902 Paulsen Building
Spokane, Washington

United States
Court of Appeals
For the Ninth Circuit

INLAND MOTOR FREIGHT, INC., a Corporation,
and PACIFIC HIGHWAY TRANSPORT, INC., a
Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLANTS

*Appeal from the United States District Court for the
Eastern District of Washington,
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BROWN & BROWN

Attorneys for Appellants

902 Paulsen Building
Spokane, Washington

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STATEMENT OF JURISDICTION

DISTRICT COURT:

This matter was commenced by Appellee in the District Court of the United States, for the Eastern District of Washington, Northern Division, seeking recovery of a sum in excess of THREE THOUSAND DOLLARS (\$3,000.00). Appellee is a Minnesota corporation and Appellants are Washington corporations (see Complaint, Record p. 3).

Said jurisdiction is founded upon Title 28, Section 1332 of United States Code, "Diversity of Citizenship - Amount in Controversy," Act June 25, 1948, c646, Sec. 1, 62 Stat. 930.

COURT OF APPEALS FOR NINTH CIRCUIT:

Judgment in said District Court was entered in favor of Appellee against Appellants July 30th, 1951 (Record, p. 45). From this judgment Appellants have appealed to United States Court of Appeals for the Ninth Circuit.

Jurisdiction therefor is founded upon Title 28, Section 1291 of United States Code, "Final Decisions of District Courts," Act June 25, 1948, c646, Sec. 1, 62 Stat. 929.

STATEMENT OF CASE

This action is brought to recover claimed short rate cancellation premium on public liability policy written by Appellee and covering Appellants concerning their respective fleets of trucks in intrastate and interstate operation as common carriers. The policy form and endorsements used are indicated in the printed Record, pp. 7 through 29. The premium to be paid under said policy was specially set forth by Endorsement No. 7 (Record, p. 25) and was stated thereon as follows:

“The earned premium shall be computed and paid monthly by applying to the gross receipts, as hereinafter defined, the rate of \$.90 . . . for the Inland Motor Freight, Inc., and the rate of \$1.35 . . . for the Pacific Highway Transport, Inc.”

Appellee had insured Appellant companies for a number of years. The policy in question, by its term, ran from April 1, 1949 to April 1, 1950. The coverage was cancelled by Appellants as of June 1st, 1949 after request and invitation so to do.

Appellee claims additional premium through application of short-rate cancellation table in the sum of FIVE THOUSAND ONE HUNDRED TWENTY-ONE and 40/100 (\$5,121.40) DOLLARS. Appellants contend they have paid all premiums payable under said policy on earned premium basis and that “the customary short rate table and procedure” is inapplicable to this policy, notwithstanding its appearance in the printed policy form used, in view of the alteration of said policy form by endorse-

ment; and the special monthly earned premium provisions.

The District Court entered judgment in favor of Appellee, from which judgment this appeal has been taken.

SPECIFICATION OF ERRORS

Appellants urge that the District Court in granting Appellee's Motion for Summary Judgment and in denying Appellants' motion therefor was in error because of the following:

1. The short rate cancellation provision of the basic policy form here used was not applicable because the insurance contract was altered by endorsement as to premium and method of payment.
2. The short rate cancellation provision of the basic policy form here used was not applicable because Appellee requested and induced the cancellation of said policy.

ARGUMENT

This case presents one issue, namely whether the short rate cancellation provision of the printed policy form used is to be applied. Appellants contend that it does not and cannot so apply

1. Because the basic printed policy form used by Appellee was changed by endorsement into a different contract and that the resultant contract of

insurance was one of special coverage concerning Appellants' fleets of trucks and was far different from the standard one-vehicle coverage for which said printed form was obviously intended, and

2. Because, although the policy was admittedly cancelled by Appellants, it was so cancelled at the request and inducement of Appellee.

The policy form and endorsements are in the Record, pp. 7 through 29. The policy form without endorsements is the standard form of insurance coverage for a single vehicle. The form itself contemplates a single prepaid premium for the entire policy period designated. The application to such premium and such unaltered policy of the "customary short rate table and procedure" is readily understandable. The front page of the policy (Record, p. 7) indicates as to premiums "See End. No. 1". The said Endorsement No. 1 (Record, p. 11) obviously is not the one meant, but it was probably intended by Appellee to refer to Endorsement No. 7 (Record, p. 25). Endorsement No. 7, together with the other endorsements concerning compliance with interstate commerce act and I. C. C. rules and regulations, molds the contract into one of a different nature. Said Endorsement No. 7 provides that "The earned premium shall be computed and paid monthly." There is no prepaid term premium and Appellee was paid in full each month in accordance with the gross receipts formula.

The District Court Judge cites the six cases follow-

ing as supporting his construction of this present policy and his decision of the matter:

Port Iron & Supply Co. v. Moore, 153 S.W. (2d) 319;

Aetna Life Ins. Co. v. American Zinc Lead & Smelting Co., 154 S.W. 827.

Aetna Life Ins. Co. v. Kansas City Electric Light Co., 171 S.W. 580.

Big Run Coal Co. v. Employers Indemnity Co., 174 S.W. 25.

Joseph Weaver & Son v. Home Life & Accident Co., 221 S.W. 299.

Maryland Cas. Co. v. Boise Street Car Co., 11 P. (2d) 1090.

A reading of these cases indicates that in every instance the contracts of insurance coverage involved therein referred to *annual* premiums, or *annual* income, or minimum *annual* premium, or estimated *annual* gross earnings. It is fairly readily seen, from these cases, that the contracts concerned were written with an *annual* minimum premium in mind and mentioned in the contract.

In the instant case, however, the only premium mentioned is monthly and the only earned premium is that mentioned and defined in said Endorsement No. 7.

In the case of *Hobson v. Mutual Health and Accident Assn.*, 227 Pac. (2) 761 (Calif. 1950), the Court stated as follows:

“In construing an insurance policy it must be borne in mind that where two constructions are reasonable that which is most favorable to the insured should be adopted . . . ”

And also

“The policy should be read as a layman would read it and not as an attorney or an insurance expert might read it.”

Then, in *29 American Jurisprudence*, page 180, is found the following:

“The general rule applicable to contracts generally, that a written agreement should, in case of doubt as to the meaning thereof, be interpreted against the party who has drawn it, is very frequently applied to policies of insurance and constitutes an important rule of construction in such respect, in view of the fact that ordinarily, and in practically all cases, it is the insurer who furnishes or prepares the policies used to embody the insurance contracts.”

And, in *12 American Jurisprudence*, page 797, the following:

“It is a well-settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control. The reason greater effect is given to the written than to the printed part of an agreement, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims.”

And as to conflict between printed matters on plaintiff's forms and typewritten matters added thereto by endorsement, it is submitted that the typewritten pro-

visions will prevail. This because they obviously are "immediate language and terms selected."

And, here it should be noted (because not apparent in the printed record) that the provisions concerning the premiums in Endorsement No. 7 are typewritten in blank space on an otherwise printed form. Further to be noted is that the printed sentence "Subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy" appears near the bottom of the page and after an inch and a half space below the typed-in matter and also following the printed "Effective date of this endorsement."

In the case of *Hawkeye Commercial Men's Assn. v. Christy* (C.C.A.), 294 Fed. 208, is found the following language:

"The natural obvious meaning of the provisions of a contract should be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover."

Ordinarily, earned premium is understood as that part of a paid-up premium which covers the time which has elapsed since the insurance began. The earned premium here was paid exactly as required under the special definition of "earned premium." (Endorsement No. 7, Record p. 25). An unearned premium, upon the cancellation of a policy, usually means that portion of the premium that is returned to the insured. And, it is further submitted that in ordinary insurance parlance,

“short rate cancellation” means and results in the *return* to the insured of the unearned premium. Here there is no such thing as unearned premium.

The basic printed policy form has been amended by several endorsement riders. Endorsement No. 7 provides that the earned premium shall be computed and paid monthly at stated rates as applied to gross receipts. The premium is in no wise fixed but is to be determined month by month. There is no means by which the insured could anticipate or compute any cancellation penalty; and by the same token it is submitted there is no means by which the insurer could compute and maintain an “unearned premium reserve” upon its books.

If there was intended any short-term cancellation formula or any cancellation penalty, the same could and should have been clearly stated on Endorsement No. 7. The absence of any such provision indicates that the changes of the basic policy form by said endorsements to a contract covering the respective fleets of equipment of Appellants and based upon gross receipt premiums computed and paid monthly negate the applicability and effect of the customary short rate table and procedure. There was nothing *customary* about this policy. As amended, it was altered to an entirely different and special contract.

Appellee requested and induced the cancellation of this policy. These parties had contracted in similar

manner for several years (Nieman deposition, Record p. 54). Appellee was familiar with the operations of Appellants and with Appellants accident ratio. Through its brokers, Gould & Gould, Appellee told Appellants in 1949 that the premium rate on their coverage was to be increased and that Appellants should seek and obtain other and substituted insurance coverage (Deposition, Record p. 52). There never was any discussion or consideration given any cancellation penalty or short-term cancellation computation of premium. Appellee was interested in increased monthly premium rate and was interested in terminating their insurance coverage of Appellants.

Appellants are common carriers in intrastate and also interstate operation and, of course, must comply with the regulations of the regulatory board and commissions in maintaining proper liability insurance coverage at all times. Upon being advised by Gould & Gould that the premium rate on the existing coverage was to be increased and upon receiving the request of Gould & Gould that Appellants obtain other insurance coverage, Appellants had no choice in the matter; they had to have proper coverage and the cancellation of the policy with Appellee was a natural result of Appellee's own invitation and request (Deposition, Record p. 55).

Appellants therefor contend and urge that The District Court erred in granting judgment to Appellee. Appellants pray that this Court reverse the decision and

judgment of the said District Court and direct the dismissal of Appellee's Complaint and said action.

Respectfully submitted,

BROWN & BROWN

ROBERT M. BROWN

Attorneys for Appellants

902 Paulsen Building

Spokane 1, Washington

No. 13127

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

INLAND MOTOR FREIGHT, INC., a
Corporation, and PACIFIC HIGHWAY
TRANSPORT, INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLEE'S ANSWER BRIEF

*Upon Appeal from the District Court of the United
States for the Eastern District of Washington*

WITHERSPOON, WITHERSPOON & KELLEY
WILLIAM V. KELLEY,
1114 Old National Bank Building,
Spokane, Washington.

Attorneys for Appellee.

FILED

FEB - 4 1952

PAUL P. O'BRIEN

No. 13127

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

INLAND MOTOR FREIGHT, INC., a
Corporation, and PACIFIC HIGHWAY
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APPELLEE'S ANSWER BRIEF

*Upon Appeal from the District Court of the United
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WILLIAM V. KELLEY,
1114 Old National Bank Building,
Spokane, Washington.
Attorneys for Appellee.

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No. 13127

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

INLAND MOTOR FREIGHT, INC., a
Corporation, and PACIFIC HIGHWAY
TRANSPORT, INC., a Corporation,

Appellants,

vs.

ANCHOR CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLEE'S ANSWER BRIEF

JURISDICTION

This action was brought by appellee Anchor Casualty Company, a Minnesota corporation, having its principal place of business in St. Paul, Minnesota, against the appellant Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., both Washington corporations having their principal places of business in Spo-

kane, Washington (Tr. 3). The action was predicated upon a policy of insurance issued by the appellee covering trucks and automotive equipment operated by appellants. The amount of recovery sought was \$5,121.40, together with interest thereon at the rate of 6% per annum from June 1, 1949, to the date of judgment herein, no part of which was admitted, but all liability was denied by the appellants (Tr. 30). The amount in controversy was therefore in excess of \$3,000.00.

Jurisdiction of the District Court existed under Sec. 1332, Title 28, U. S. C. A. (amended).

The appellants have appealed from the final judgment granting relief to plaintiff entered July 30, 1951 (Tr. 45). Notice of appeal was served upon attorneys for appellee and filed August 28, 1951 (Tr. 47).

Jurisdiction of the 9th Circuit Court of Appeals to review the case is believed to exist under Sec. 1291, Title 28, U. S. C. A. (amended).

COUNTER-STATEMENT OF THE CASE

Appellants' brief statement of the case is controverted in two respects. Appellants' statement of the case is controverted wherein, first, it is stated that the cancellation by appellants of the insurance coverage was "after request and invitation so to do." Second, the statement that the policy form was altered by endorsement (Br. 6). The following somewhat more extended statement of the facts should be of assistance to the Court.

This action was brought by appellee to recover from appellants a balance alleged to be owing as premium on an insurance policy issued by appellee to appellants. Appellant corporations were engaged on April 1, 1949, in the operation of freight lines for the transportation of freight by motor trucks. Their motor vehicles were insured against property damage and bodily injury liability by appellee. It was alleged in the complaint (Tr. 3-6) and admitted by the answer (Tr. 32-33), and stipulation (Tr. 37-38), that the policy was procured by the appellants and issued by the appellee to them on or about April 1, 1949; that it insured appellants for a period of one year from said date against public liability and property damage in the operation of automotive equipment operated by them; that it provided that the premiums should be paid by appellants monthly in amounts based upon the gross receipts of their operations; that it provided it might

be cancelled by appellants, in which case the earned premiums were to be computed in accordance with the customary short rate table and procedure (short rate table is printed on the policy) (Tr. 10); that appellants cancelled the policy when it had been in force 61 days; that an amount *equaling* the premiums for the 61 days, computed at the full period rate named in the policy, had been paid, but that the earned premiums for the 61 days of actual coverage, computed at the short rate, exceeded that amount by \$5,121.40, which is the amount for which, together with interest, the suit was brought.

On the last page of the policy, Section 22, cancellation specifically provides, in part:

“ . . . If the named insured cancels, earned premiums shall be computed in accordance with the *customary short rate table and procedure*. (Italics ours.) If the company cancels, earned premiums shall be computed pro rata . . . ” (Tr. 10).

Also on the last page and following the text of the policy was a table headed “SHORT RATE CANCELLATION TABLE for Term of One Year.” According to the table, 27 per cent of the annual premium was to be charged when the policy had been in force 61 days (Tr. 61). By bill of particulars appellee filed a copy of the insurance policy which appears in full at pages

7-29 of the transcript, the verity of which was admitted by appellants (Tr. 34). Appellee contended and the District Court held that this short rate should be applied and that it should be computed by dividing the earned premium for the 61-day period by 61 and then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum. Endorsement No. 7 (Tr. 25) recited that the earned premium should be computed and paid monthly by applying to the gross receipts as therein defined the rate of \$.90 a hundred for appellant Inland Motor Freight, Inc., and \$1.35 a hundred for appellant Pacific Highway Transport, Inc. This endorsement No. 7 specifically stated that it was "subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy." In addition to the pleadings, a stipulation of the parties and admission of appellee corporation pursuant to Rule 36, there was filed the deposition of Gus H. Nieman, the president of the appellant corporations. Based upon the record, consisting of the foregoing, each of the parties moved for summary judgment. The Court granted the motion of plaintiff and entered judgment for the amount sued for in the complaint, from which judgment this appeal is taken.

ARGUMENT

Appellants attack the judgment upon the ground that the short rate cancellation clause of the printed portion of the policy (Tr. 10, par. 22) was not applicable. They contend, first, that the printed clause mentioned was altered by Endorsement No. 7 (Tr. 25-27) and that the two provisions conflict, and, second, that the cancellation was requested and induced by appellee.

I. POLICY WAS NOT ALTERED

Endorsement No. 7 did not alter the short rate cancellation clause. The only one of the nine endorsements which bears on the question is endorsement No. 7 which made provision for a monthly payment of the premium for the convenience of the assured.

(1) There was a fixed premium: \$.90 and \$1.35 for each hundred dollars of gross receipts of appellants Inland Motor Freight, Inc., and Pacific Highway Transport, Inc., respectively. Gross receipts are defined in the policy to mean total gross revenue before deductions of any charges or expenses (Tr. 25, 26).

(2) The short rate cancellation table (Tr. 8) and the appellants' own record were the means for computing the premium (Tr. 50, 51, 59, 62-65).

The short rate cancellation table for a term of one year provided that 27 per cent of the annual premium should be charged when the policy had been in force 61 days and was cancelled by the appellants. This short rate should be applied and should be computed by dividing the earned premium for the 61-day period by 61, then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum. By that method of computation the short rate premium, less the amount paid, would be \$2,529.91 for appellant Inland Motor Freight, Inc., and \$2,591.53 for appellant Pacific Highway Transport, Inc. (Tr. 40, 41).

(3) The fact that the parties to the insurance contract made provision for monthly payment of the premium rather than one single large payment prepaid makes no difference as to the operation of the short rate cancellation table. This same endorsement required the insured to pay a deposit premium of \$4,500.00 to be applied to the earned premium "for the last month of the policy period as computed above." Endorsement No. 7 was put on for the convenience of the insured appellant corporations and specifically recites that it is "subject in *all other respects* to the limits of liability, exclusion, *conditions and terms of the policy.*" (Italics ours.) (Tr. 25.)

After submission of memoranda by both parties the trial Court took the matter under advisement and sub-

sequently rendered his opinion in favor of appellee, citing in support of his decision the following cases:

Actna Life Ins. Co. v. American Zinc Lead & Smelting Co., 154 S. W. 827 (1913);

Actna Life Ins. Co. v. Kansas City Electric Light Co., 171 S. W. 580 (1914);

Big Run Coal Co. v. Employers Indemnity Co. 174 S. W. 25 (1915);

Joseph Weaver & Son v. Home Life & Accident Co., 221 S. W. 299 (1920);

Maryland Casualty Co. v. Boise Street Car Co., 11 P. (2d) 1090 (1932).

In the *American Zinc Lead & Smelting Co.* case, *supra*, an insurance policy for twelve months which contained a special written provision for paying the premium *monthly*, as did Endorsement No. 7 in the case at bar, was held to be a contract for a year and the special written provision was held not to give the assured the right to cancel without the application of the short rate cancellation table. The same question was involved as in the case at bar which was thus described by the District Court here (Tr. 40): "The question to be determined is whether defendants, because of their cancellation of the policy, should be charged according to its short rate cancellation provisions—that is to say, 27 per cent of the annual premium." In the *American Zinc Lead & Smelting Co.* case, *supra*, the Court said at page 829:

“In fact, the method or time of paying the premium, whether in advance or at the termination of the policy period, or in one or many payments, would ordinarily have nothing to do with the provisions or terms for cancellation of the policy.”

Endorsement No. 7 does not conflict with the short rate cancellation clause. (Compare Tr. 25-26 with Tr. 10.) As was said in *Aetna Life Ins. Co. vs. Kansas City Electric Light Co.*, *supra*, “Effect must be given, if possible, to all parts of the instrument. Different portions are not to be deemed conflicting, if they can be harmonized and both upheld.”

In *Big Run Coal Co. v. Employers Indemnity Co.*, *supra*, where an indemnity insurance policy was involved, the Court observed at page 26, in language which could be applied to the case at bar:

“The policy, however, provided, that it might be cancelled at any time, by either of the parties, upon written notice to the other party stating when thereafter the cancellation should become effective, and that the date of the cancellation should be the end of the policy period. If the policy should be cancelled at the request of the appellant, the amount to be paid as a premium by appellant should be the compensation for the full original policy period to the date of cancellation, and the earned premium calculated at the customary short rates, in accordance with a table printed on the policy.”

Again, a rider appended to a policy of Workmen's Compensation insurance issued to an employer was

involved in the case of *Joseph Weaver & Son v. Home Life Accident Co.*, *supra*, where it was held not to have modified the short rate cancellation clause, and hence where the policy was cancelled before the expiration of the period it had to run (as in the case at bar) the premium must be computed according to the short rate cancellation clause. In language singularly apropos to the facts in the case at bar the Court there said:

“First, there is no suggestion in the ‘rider’ that it referred to, modified, extended, or limited in any way the terms of the short rate cancellation clause . . . This ‘rider’ does not reduce this policy from a yearly contract to a monthly contract. By its terms it permitted appellants to pay the premiums monthly, rather than on the terms stated in the original policy, which contemplated and provided for the premium to be paid for the whole year in advance.”

Finally, in several important respects the case at bar is similar to the case of *Maryland Casualty Co. v. Boise Street Car Co.*, *supra*, where it was held that although computation of premiums on a bus carriers’ liability policy was based on actual gross earnings for a year, a provision for a short rate premium on cancellation of the policy before the year had expired by the insured was valid. It was further held that the method by which the insured’s actual earnings for the year could be approximated as a basis for determining this short rate premium on the cancelled policy could be by obtaining the average daily gross receipts for

the period the policy was in force and multiplying the result by the days in the year.

In the case at bar, as the District Court pointed out (Tr. 39) on the last page of the policy a section in print designated as Paragraph 22 headed "Cancellation" (Tr. 10) provided that:

"This policy may be cancelled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective . . .

"If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata."

In the Maryland Casualty Company case there was a similar provision which provided, in part:

"H. This policy may be cancelled by the company at any time by written notice sent by registered mail or delivered to the Assured stating when thereafter the cancellation shall be effective. It may be cancelled by the assured by like notice. If cancelled by the company, the company shall be entitled to the earned premium, pro rata. If cancelled by the assured, the company shall be entitled to the earned premium calculated at short rates, in accordance with the printed table on the back of the policy . . .

“Printed on the back of the policy was a table of short rates ‘For One-Year Policies.’ It is conceded by counsel that, if the short rate applies to this case, the premium for the 209 days the policy was in force would be 74.84 per cent of the premium for one year.”

The District Court in the case at bar summarized the insurer’s position when he stated:

“Plaintiff contends that the short rate should be applied and that it should be computed by dividing the earned premium for the 61-day period by 61; then multiplying by 365 to arrive at the estimated annual premium. The short rate would be 27 per cent of that sum.” (Tr. 40.)

This same method of computation by the insurer was upheld by the Court in the Maryland Casualty Co. case, *supra*, which observed at page 1094:

“Since the policy was terminated before the end of the policy year, it is manifest that it had expired and that no basis for the ascertainment of the gross earnings for a year could be determined from the actual gross earnings for a year which had not then elapsed. Practically the only method by which the actual earnings for a year could be approximated was to divide the amount of the actual gross earnings, developed by audit, for the number of days the policy was in force, by such number (209), thereby obtaining the average daily gross receipts for said period (209 days), and multiplying the result by 365. This procedure seems to have been recognized by the courts in the interpretation of analogous contracts involving premiums based upon annual pay rolls, although

the reports do not always definitely disclose the policy provisions upon which some of these decisions are based.

“*Big Run Coal Co. v. Employers’ Indemnity Co.* 163 Ky. 596, 174 S. W. 25;

Bituminous Casualty Corp. v. Marion County Coal Co. 258 Ill. App. 6;

Joseph Weaver & Son. v. Home Life & Accident Co. (Tex. Civ. App.) 221 S. W. 299;

Commercial Casualty Co. v. Rice, 93 Misc. Rep. 567, 157 N. Y. S. 1.”

Each of these decisions, in one or more respects, refutes appellants’ contentions. None to the contrary are cited by appellants. Appellants seek (Br. 9) to distinguish them from the case at bar, but we find no such distinction. Rarely does one find cases so nearly identical on the facts and questions of law involved as are they with the case presented here.

Appellants point out that the printed portion of the policy here is adapted to coverage for a single motor vehicle, and apparently assume that the use of riders to cover a fleet must constitute a change in its terms.

In *Maryland Casualty Co. v. Boise Street Car Co.* (Idaho) 11 P. (2d) 1091, the appellant operated a fleet of eight passenger busses. There is nothing unusual in the form of the policy. It is of a class described in 45 C. J. S. 122, particularly in the second paragraph

appearing on that page. In indemnity policies, where either the subject matter or the method of determining premium is extensive or complicated, no printed form could be devised practicably adaptable to the multitude of particular situations of the businesses to be insured by mere filling in of blanks. In such cases the adaption to the facts is made by riders or "endorsements" as here. The cases cited above illustrate the practice followed here by appellee. The method of computation of the premiums was embodied in Endorsement No. 7 (Tr. 25-27), which was signed by the insurer by its president, dated the same day as the policy, referring to and forming a part of it.

Endorsement No. 7 provided, among other things, that the insured should pay at the effective date of the policy, a required deposit of \$4,500.00; that the earned premium should be computed and paid monthly by applying specified rates to the gross receipts of the two corporations, and the deposit premium expressed on the first printed page to be applied to the last monthly earned premium, with proper adjustments, if any. It defined gross receipts, provided for inspection, and identified the policy to which it was attached. The rider made no reference to cancellation and contained no suggestion of change of the printed policy in any respect, but closed with the express statement "subject in all other respects to the limits of liability, exclusions, conditions and other terms of the policy."

The entire substance of the premium provisions of the rider could as well have been written into the blank on page 1 of the policy (Tr. 7) designated "Premiums," had the space permitted; there would have been no conflict between the provision so inserted and the printed Paragraph 22, nor any ambiguity as to the cancellation privilege. Nor is any conflict or ambiguity created by the use of the rider in lieu of filling a blank. Indeed, appellants must have looked to Paragraph 22 for the right to cancel at all; and certainly there was nothing in Endorsement No. 7 that could be construed as avoiding Paragraph 22 in part and retaining it as to the remainder.

A rider attached to a policy is to be construed in connection with the other provisions of the policy and the entire contract harmonized therewith if possible.

"Notwithstanding the attaching of a rider, provisions of the body of the policy are still parts of the contract and are not superseded, waived, limited or modified by the provisions of the rider, except to the extent that it is expressly stated in the rider that the provisions thereof are substituted for those appearing in the body of the policy, or that the provisions of the rider have the effect of creating a new and other contract from that of the original policy."

44 C. J. S. 207

"It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. Unless the rider is irreconcilable with the printed clause, such must stand."

Aetna Insurance Company vs. Sacramento-Stockton Company, (CCA, 9th Cir.) 273 F 555.

The rules quoted by appellants (Br. 9-11) to the effect that an insurance policy reasonably capable of two constructions must be construed most favorably toward the insured, and that if the meaning of a written agreement is doubtful, it should be interpreted against the party who has drawn it and that in such case, a written part of the contract will prevail over a printed part, are, of course, elementary. But none of them apply where the contract is free from ambiguity. Without extending this brief by citations, we cite here each of the decisions cited hereinabove (p. 8), and we quote from *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269 at 275, 64 Pac. (2d) 1050, and refer to the citations therein as follows:

“The rule that the contract will be construed most favorably to the insured will be applied only when there is an unexplained ambiguity in the language of the contract. It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. (Citations.)

“The liability of respondent is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control. (Citations.)

“In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Ins. Co.*, *supra* (41 Wash. 199, 83, Pac. 113) but this rule

should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured. (Citations.)

* * *

“Unless the rider on the insurance policy is irreconcilable with the printed clause, such clause must stand; but if it is inconsistent and irreconcilable, the rider will control. (Citations.)

II. APPELLEE DID NOT CANCEL

Appellants allege as an affirmative defense (Tr. 30-31) that after the issuance of the policy in April, 1949, and prior to its cancellation, appellee told them the rates would be increased and that they would have to agree to the increase effective from and after June 1, 1949, and if they failed to agree to such increase the policy would be cancelled. This affirmative defense was denied by reply (Tr. 32). The evidence falls far short of establishing the facts so pleaded. No evidence was introduced other than the deposition of Gus H. Nieman, president of appellant corporations (Tr. 48-66). He testified to a conversation with the brokers through whom both the then existing policy issued by appellee and the policy here involved were obtained. The conversation was had in January, 1949 (Tr. 55), some 60 days before the issuance of the present policy on April 1, 1949, rather than afterwards as pleaded. In that conversation he states (Tr. 52) the broker told him they would have to increase the rate, and if he could find other coverage he should do so; and that (Tr. 55) the broker gave him just 90 days to pay the

increase or find something else. After this conversation was had nothing was done by either party within the 90 days except that within some 60 days, on April 5th, as of April 1st, the policy here involved was procured by appellants and issued by appellee, without any mention of cancellation except on the usual terms. That it was so procured and issued is admitted by appellants in the pleadings; that it was accepted by them is evidenced by the facts, among others, that they paid the specified \$4,500.00 deposit as premium and paid the April and May premiums earned under its terms.

In the absence of fraud or mistake, a policy of insurance on acceptance thereof supersedes all preliminary negotiations and agreements, even though the insured does not read it. It is his duty to read it and he is presumed to have knowledge of and to have assented to all the provisions and cannot plead ignorance of its conditions or legal effect:

44 C. J. S. 1071-1072

Abelson v. Fidelity & Casualty Company, 164 Wash. 20, 2 Pac. (2d) 272;

Vermillion, etc. Co. v. Norwich Union Fire Insurance Society (C. C. A. 9th) 146 F 695, (cited in *Lumber Underwriters v. Rice*, 237 U. S. 605);

and parol evidence cannot be admitted to vary the contract. (Ibid.)

Furthermore, evidence of any alleged verbal agreement would be incompetent because, (1) it would vio-

late the parol evidence rule; (2) it would violate Washington State Insurance Code §45.18.19 (RRS 1947 Supp. p. 574) which provides, "No agreement in conflict with, modifying or extending any contract of insurance shall be valid unless in writing and made a part of the policy." Also, to pro rate such a policy would be violative of Washington Code §45.30.14 relative to rebates and discounts. (RRS 1947 Supp. p. 660.)

Finally, there is no pleading or evidence of any kind indicating that the appellee ever agreed for any cancellation of the policy other than on the short rate term. Mr. Gus H. Nieman testified for appellants, in part, "I don't recall the exact transaction that took place regarding the cancellation." (Tr. 52.) As president of appellant corporations he apparently didn't know much about the policy at all. He said, "I didn't even know the policy expired, had no idea when the policy expired or when or why." (Tr. 57.) Certainly this is not sufficient evidence to reform a written instrument. Indeed, the whole defense seems to be a matter of hindsight. The fact of the matter seems to be that the appellant corporations cancelled because they wanted to go into an insurance company of their own, the Transport Indemnity, in which they were personally interested along with 150 or more other truckers (Tr. 55). That was their privilege but they should abide by the written contract they had previously made and pay for that privilege by way of the short rate cancellation table.

CONCLUSION

In conclusion we repeat that the five decisions hereinabove cited (page 8) clearly support the judgment herein on almost identical facts; that here, as in them, there is no ambiguity or conflict between the provisions of the policy; that, therefore, each of its provisions, including that specifying the application of the short rate table to the premium computation, must be given effect if the Court is not to write a new contract for the parties; and that the judgment should be affirmed.

Respectfully submitted,

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No. 13129

United States
Court of Appeals
for the Ninth Circuit.

See vol. 2715

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 266)

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2673 Civil

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVEY; CONTI-
NENTAL CASUALTY COMPANY, a Corpo-
ration; A. J. GOERIG and CLYDE PHILP,
Individuals,

Defendants.

COMPLAINT

I.

Jurisdiction is found on diversity of citizenship and amount.

Plaintiff is a resident of the State of Oregon, and Defendants are all residents of the State of Washington, except the Defendant, Continental Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds \$3,000.00.

II.

That during the times herein complained of, Defendants conspired to injure, defraud and damage Plaintiff in the following particulars, to wit:

(a) Plaintiff at all times herein complained of

and for many years prior thereto, had been engaged in business as a concrete contractor and general contractor. On or about the 15th day of March, 1944, Plaintiff entered into a subcontract with the Defendants Sam Macri, Don Macri and Joe Macri, dba Macri & Company, pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza Irrigation Project near Yakima, Washington.

(b) Plaintiff posted bonds as required, and within the times stipulated entered into performance of said subcontract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications.

(c) Thereafter said Macri & Company grossly breached the terms of said subcontract by not paying sums due Plaintiff; by not furnishing suitable materials, by not supplying said materials timely, by not properly and timely performing the excavating and grading, all of which defaults by said Macris were seriously jeopardizing Plaintiff's financial condition and adding materially to Plaintiff's cost of performance.

(d) Plaintiff thereupon retained the services of the law firm of Skeel, McKelvey, Henke, Everson & Uhlmann of Seattle, Washington, and particularly Defendant W. R. McKelvey, made full disclosure of Plaintiff's financial condition; the defaults of said Macris in not making the required payments

to Plaintiff, in not furnishing suitable materials, in not supplying said materials timely, in not properly performing the excavating and grading, in not doing said excavating and grading timely and of two meetings between Defendant Sam Macri and Plaintiff out in the field on the project, all as aforesaid; and that they were bonded by Continental Casualty Company with both performance and payment bonds, and sought the services of the Defendant McKelvey to take action to terminate said subcontract on account of said defaults by said Macris and to sue on quantum meruit for services rendered to date, and also to terminate a second subcontract for similar work with said Defendants Macris on account of their defaults.

(e) That at all times from the date W. R. McKelvey, one of the partners in the said firm of Skeel, McKelvey, Henke, Everson & Uhlmann, was first retained until the ultimate termination of his contract of employment on or about the 20th day of October, 1945, said Defendant McKelvey took no action whatsoever to terminate said contract, or bring suit against said Macris for the reasonable value for the services rendered by Plaintiff or to compel said Macris to perform in accordance with said contract, and at all times said Defendant McKelvey urged Plaintiff to complete his said contract, which Plaintiff did.

(f) Thereafter, Defendant McKelvey advised Plaintiff that Defendant Macris were then judgment proof and suggested that the Plaintiff follow

certain courses of action that would be fraudulent as to creditors, which advice Plaintiff rejected. Defendant McKelvey thereafter continued to delay the taking of any action whatsoever against the Defendant Macri and their bonding company as requested by Plaintiff, until Plaintiff became concerned about the statutes of limitation and on or about the 20th of October, 1945, inquired of Defendant McKelvey what the applicable limitations period was and then was informed that he had approximately one month left within which to file suit.

(g) At said conference on or about the 20th day of October, 1945, between Defendant McKelvey and Plaintiff, Defendant McKelvey then informed Plaintiff for the first time that he could not represent Plaintiff in any action against the Defendants Macri; that Macri Company was a good customer of Continental Casualty Company and that Continental Casualty Company was one of Defendant McKelvey's largest accounts.

(h) Plaintiff thereupon retained the services of an attorney in Yakima, Washington, who promptly investigated the facts and on or about the first day of December, 1945, made a written demand upon Defendants Macri for the payment of sums due Plaintiff for the performance of said work and gave the said Defendants Macri until the 15th day of December, 1945, within which to meet said demand, said notice specifying that in the event of said Defend-

ants' failure to do so, suit would promptly be instituted for collection of the same.

(i) That on or about the 14th day of December, said Defendants Macri filed a suit in the Circuit Court of the State of Oregon for the County of Multnomah, alleging damages suffered by themselves in the amount of \$40,000.00 by virtue of Plaintiff's alleged breach of said second sub-contract for the performance of similar concrete work on another section of said Roza Irrigation Project.

(j) Said suit in Multnomah County, Oregon, was malicious, willful, without probable cause, and was filed for the sole purpose of and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, and reducing him to such an impecunious financial condition as to make virtually impossible the filing and prosecution of the threatened suit in Yakima.

(k) That despite the filing of said suit in Multnomah County, Oregon, Plaintiff did file suit in the Federal District Court in Yakima, Washington, on or about the 20th day of December, 1945, Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order from the trial judge dismissing said suit on condition Plaintiff file in Seattle, which Plaintiff did and the trial court in addition also advised the said Defendants to file counter-claim in Plaintiff's suit in Yakima, Washington.

(l) After the filing of Plaintiff's suit in Yakima,

Washington, as aforesaid, against Defendants Macri and Defendant Continental Casualty Company, Defendant Continental Casualty Company then brought to Plaintiff's attention for the first time the fact that there should also be named as additional parties defendant in Plaintiff's said suit, a partnership composed of Defendants Clyde Philp and A. J. Goerig, who according to Continental Casualty Company, were partners with each other, that they entered into a joint venture agreement with the Macris in December, 1943. Plaintiff did, thereupon, amend his complaint so as to name as additional parties defendant, said Clyde Philp and A. J. Goerig. Plaintiff also discovered for the first time during the course of trial of said suit in Yakima, Washington, that Defendant Philp not only was a silent partner in the joint venture with Defendants Macri and Goerig, but also had signed as attorney-in-fact for Continental Casualty Company, the bonds posted by Defendants Macri. Plaintiff also discovered after the conclusion of the above suit, that Willard E. Skeel of the law firm of Skeel, McKelvey, Henke, Everson & Uhlmann, appeared as attorney of record for Defendant Continental Casualty Company on the first day of the trial of Plaintiff's said suit in Yakima, Washington, and Plaintiff had no knowledge of said suit coming on for trial on this the 21st day of February, 1947, and was not present or represented by his attorney on this date.

(m) Full trial was had upon the merit of Plain-

tiff's complaint, and of Defendants' answer and cross-complaint in Plaintiff's suit in Yakima, Washington, which ultimately resulted in judgment in the trial court in favor of plaintiff and against the Defendant of Plaintiff's suit for quantum meruit, and also in a judgment against Defendants and in favor of Plaintiff in the sum of One Dollar as to Defendants' cross-complaint. In furtherance of Defendants' concerted plan, appeal was taken from said judgment first to the Circuit Court of Appeals and finally to the Supreme Court of the United States, said litigation not being concluded until on or about the 9th day of November, 1949, at which time the draft issued by Continental Casualty Company was finally paid. Plaintiff having accepted said draft on November 4, 1949, at his attorney's office in Yakima, Washington, but only after two hours and ten minutes of argument with the attorneys for the Continental Casualty Company before they deleted three words on the reverse side of the draft which would in all probability have had the effect of precluding any possibility of Plaintiff maintaining this suit.

(n) That all of the actions aforesaid were the result of concerted action by Defendants, and each of them, in that Defendant McKelvey accepted the employment by Plaintiff, yet his entire action was detrimental and antagonistic to the interests of Plaintiff, and should never have been accepted by Defendant McKelvey because of conflicting interests of his former and then present client, the Defendant

Continental Casualty Company, and further in that Defendant McKelvey at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvey.

(o) That the damages hereinafter complained of were the direct and proximate result of the breach of the attorney-client contract of employment between Plaintiff and Defendant McKelvey, in that said Defendant McKelvey failed to advise Plaintiff that he represented Continental Casualty Company, which had or might have a conflicting interest, and by not performing the services which he undertook and agreed to perform, and were the direct and proximate result of the concerted conspiracy of Defendants, and each of them, to injure, damage and defraud Plaintiff.

III.

That by reason and virtue of the intentional, concerted conspiracy of Defendants to injure, damage and defraud the Plaintiff, Plaintiff has suffered damages to his credit, to his business, to his reputation, has suffered serious monetary damage in the preparation and conduct of the aforesaid litigation, in that Defendant McKelvey neither rejected the employment by Plaintiff which he should have done

by reason of the conflicting interests between his client, Plaintiff herein, and his client, the Defendant Continental Casualty Company, nor by performing the services which he was employed by Plaintiff to do and also serious financial damage by reason of Plaintiff being required to spend practically his entire time for nearly four years in the preparation of and conduct of the litigation hereinabove referred to, thereby depriving him of the earning capacity which otherwise he would have enjoyed had he been allowed to use this time in the conduct of his other business affairs, all of said damages totaling the sum of \$1,000,000.00.

For Second and Separate Cause of Action, Plaintiff alleges as follows:

I.

Plaintiff by this reference thereto, realleges all of the pertinent portions of Plaintiff's First Cause of Action, as though set out herein in full.

II.

Plaintiff further alleges that all of the acts and things complained of were willful and with intent to harm, damage, defraud and injure Plaintiff, and in fact did severally damage and injure Plaintiff, and by reason thereof Plaintiff is entitled to receive, in addition to the general or compensatory damages alleged in Plaintiff's First Cause of Action, punitive damages in the amount of \$1,000,000.00.

Wherefore, Plaintiff prays that he have judg-

ment against Defendants, and each of them, on his First Cause of Action in the sum of \$1,000,000.00; and, on his Second Cause of Action, in the sum of \$1,000,000.00, together with his costs and disbursements.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed Dec. 1, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. That no bond or stipulation for costs has been filed by the plaintiff; and, in the alternative, the motion to dismiss is denied, defendant moves that the plaintiff be required to file a stipulation for costs in the sum of \$1000.

2. The complaint fails to state a claim against this defendant upon which relief can be granted.

3. The cause, if any, has been barred by the Statute of Limitations; that more than two years has expired since the commencement of any cause of action against this defendant.

4. That there is a misjoinder of causes of action.

5. That there is a misjoinder of parties defendant.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ A. P. CURRY,
Attorneys for Defendant,
W. R. McKelvy.

[Endorsed]: Filed Dec. 21, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM

The defendant Continental Casualty Company, a corporation, moves the Court to dismiss the action against Continental Casualty Company, a corporation, for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

/s/ CARL E. CROSON,
/s/ WILLARD HATCH.

Notice of Motion

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court

at Room 609-611, United States Courthouse, Seattle, Washington, on the 9th day of January, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,

/s/WILLARD HATCH.

[Endorsed]: Filed Dec. 27, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

I.

The defendants, Sam Macri, Don Macri and Joe Macri, move this Court for an Order to Dismiss plaintiff's First Cause of Action against them for failure to state a claim, and for the further reason that the action has not been brought within the time permitted by law.

II.

The defendants herein named move this Court to dismiss the Second Cause of Action against them for failure to state a claim in that punitive damages are not permitted in the State of Washington.

/s/ GRANVILLE EGAN,

Attorney for the Defendants, Sam Macri, Don Macri and Joe Macri.

[Endorsed]: Filed Jan. 15, 1951.

[Title of District Court and Cause.]

HEARING ON DEFENDANT
W. R. McKELVY'S MOTION TO DISMISS

Before: The Honorable John C. Bowen,
District Judge.

January 9, 1951

Appearances:

M. C. SCHAEFER,
Per Se Appeared for Plaintiff.

A. P. CURRY,
Appeared for Defendant W. R. McKelvy,

CARL E. CROSON, and
WILLARD HATCH,
Appeared for Defendant Continental
Casualty Company.

The Court: There is a matter on the calendar noted for today entitled Schaefer vs. Macri, et al., hearing on defendant's motion to dismiss.

Mrs. Curry: Defendant McKelvy is ready, your Honor.

The Court: Is anyone here representing the plaintiff Schaefer?

Mr. Schaefer: Here.

The Court: Is there anyone here representing Don Macri? Is there anyone here representing Continental Casualty Company?

Mr. Croson: Yes, Your Honor.

The Court: Will all attorneys and parties, if they are not too numerous, take a place at counsel table? Is there any other attorney present? Now, may I ask each of you at the counsel table to state your name and for whom you appear, if anyone?

Mr. Schaefer: This is Mrs. M. C. Schaefer.

The Court: Is she the wife of the plaintiff, M. C. Schaefer?

Mr. Schaefer: That is right, and my name is M. C. Schaefer, plaintiff in this case.

The Court: Are you represented by counsel?

Mr. Schaefer: I am not. I was unable to get counsel.

Mr. Hatch: My name is Willard Hatch, one of the attorneys for Continental Casualty.

Mr. Croson: Carl E. Croson, one of the attorneys for Continental Casualty.

Mrs. Curry: Alpha P. Curry, representing defendant W. R. McKelvy.

The Court: My understanding is the matter comes on at this time for a hearing on defendant's motion to dismiss, is that your understanding?

Mrs. Curry: It is defendant W. R. McKelvy, and I presume Continental Casualty——

Mr. Croson: Each of the two defendants has a motion to dismiss.

The Court: They have separate motions?

Mr. Croson: Yes, Your Honor.

The Court: Which one of you desires to speak first on behalf of the motion?

Mr. Croson: Mrs. Curry will speak first. Her motion was in first.

Mrs. Curry: Your Honor, I think that this is the first time I have ever seen a lawsuit brought against a lawyer because the client left the lawyer and hired another lawyer and won his lawsuit. At any rate, the complaint is voluminous and for the convenience of everybody concerned, in order to understand it, I have made an outline of it and attached it to the motion to dismiss.

The Court: Mrs. Curry, have you an opinion about how long you should speak?

Mrs. Curry: I think I can get by in ten minutes. Mr. Croson says it will take twenty minutes.

The Court: Mr. Schaefer, how long do you think you would like?

Mr. Schaefer: I have got a whole lot longer than that, I am sure.

The Court: Do counsel and those connected with this case feel it would be unfair to you if the Court gave other counsel an opportunity to finish the matter they began?

Mrs. Curry: Certainly not, Your Honor.

Mr. Croson: We yield readily, Your Honor.

Mrs. Curry: We prepared a motion to dismiss and served the plaintiff and submitted a memorandum of authorities treating the complaint a complaint in conspiracy. Today I have a supplemental memorandum of authorities and I will serve the plaintiff with the same.

The Court: Well you turn to the memorandum

of defendant W. R. McKelvy in support of the motion to dismiss, filed December 21, 1950, and look at line 20? "The motion should be dismissed because the complaint does not state a cause of action." Do you mean the "action," rather than the "motion," should be dismissed?

Mrs. Curry: The action or the cause.

The Court: Do you consent, and does anyone else have any objection, that I substitute the word "action" for "motion"? Is there any objection.

Mrs. Curry: It was a typographical error.

I think the first thing is to understand what the complaint says, before we discuss anything else with reference to it. Paragraph I, of course, is perfunctory; it states that the plaintiff is a resident of Oregon.

Paragraph II starts out with a general allegation that the defendants conspired to injure, defraud and damage the plaintiff. I have this at the end of my memorandum, or you can follow it in the complaint.

(a) Under paragraph II, alleges that the plaintiff presumably had a subcontract with the Macris named defendant on the Roza project.

(b) Alleges that he posted bond and proceeded with the subcontract.

(c) He alleges that Macris breached the contract, just a general allegation that they breached it.

(d) He alleges that upon the Macris' breach, he retained—I used the word employed, and that is stronger than the complaint, the complaint said

retained—the services of Skeel, McKelvy, Henke, Evenson & Uhlmann, and particularly W. R. McKelvy, and he thereupon disclosed his financial condition, disclosed the Macris' defaults in payments, disclosed the Macris' defaults in not furnishing the proper materials, disclosed the Macris' defaults in not supplying the material timely, disclosed the Macris' defaults in excavating, disclosed the Macris' defaults in not excavating timely; alleges two meetings, alleges that there were two meetings between Sam Macri and himself on the field; alleges that he told W. R. McKelvy that they—and “they” presumably means the Macris—were bonded by Continental Casualty.

He alleges that they were bonded for performance, and a payment bond, that is all he says, and he sought the services of this counsel

- (1) To terminate the subcontract,
- (2) To sue on quantum meruit,
- (3) To terminate a second subcontract. What that was isn't mentioned.

Then he goes on and says—he doesn't say when he employed McKelvy—that from the time that W. R. McKelvy was first retained until the ultimate termination of his contract of employment on October 20, 1945, on the ultimate termination of his contract of employment on October 20, 1945, W. R. McKelvy took no action to terminate the contract, sue the Macris for plaintiff's services, or compel Macris to perform, and urged the plaintiff to complete his contract, which he did.

Then he said thereafter—presumably that would

be after October 20, when he got rid of McKelvy—W. R. McKelvy said, (1) The Macris were judgment proof; (2) Suggested actions which would be, in his opinion, in fraud of creditors; (3) McKelvy told him the plaintiff had only one month to sue the Macris, in answer to an inquiry as to what his time limitation was.

Then he alleges that McKelvy told him on October 20, 1945, when the contract for services with McKelvy was terminated, that he could not represent him in an action against the Macris, and the plaintiff thereupon employed a lawyer in Yakima who made a demand on the Macris.

Then he said—I do not know what it means—the Macris sued the plaintiff in Oregon, December 14, 1945, that was after he got rid of McKelvy, and that the Oregon case was malicious, willful, without proper cause, etc. Then he said that the plaintiff filed his suit in Yakima, December 20, 1945—presumably this is the suit against the Macris—and got the Oregon suit which the Macris apparently brought against him and for which McKelvy is not associated in any way, got the Oregon suit dismissed on certain conditions; namely, that he file in Seattle, and that the judge in Oregon gave him some advice to file in Seattle, which he did, and that this judge down in Oregon advised the Macris to file a counterclaim in the Yakima suit.

Then after the Yakima suit was filed, he said the Continental Casualty Company told him that they are named as defendants, were joint adventurers

with the Macris on this Rosa project, and the plaintiff amended his complaint, presumably the Yakima suit; and the plaintiff also discovered after conclusion of the above suit—I do not know what that means, but I presume it means the Yakima suit—that he discovered after the conclusion of the above suit that Willard Skeel of the firm of Skeel, McKelvy, Henke, Evenson & Uhlmann appeared as attorney of record for the defendant Continental Casualty Company in another lawsuit on the first day of the trial and was in another lawsuit on the first day of the trial of plaintiff's suit in Yakima—what connection that has I do not know—and that the plaintiff had no knowledge that that suit was coming to trial, but it does not allege that he was involved in it, on the 21st day of February in 1947, and was not present or represented by counsel on that day.

That was in 1947, and the trial was had in Yakima and the lawsuit resulted in judgment in his favor—that presumably is the suit that he wanted McKelvy to bring against the Macris and which he got another lawyer to bring—and also in judgment against the defendants in favor of the plaintiff on the defendants' cross-complaint of one dollar. I am quoting, "In furtherance of defendants' concerted plan," appeal was taken which concluded November 9, 1949, and Continental's draft was paid—judgment was paid, in other words, I presume—Continental's draft was paid, which was accepted by the plaintiff—he uses the word "accepted"—on No-

vember 4, 1949, after an argument resulting in the deletion of three words on the reverse side of the draft.

That all the actions aforesaid were the result of concerted action by the defendants and each of them in that W. R. McKelvy accepted employment by the plaintiff—but he was fired, his services were terminated on October 20, 1945. Yet his entire action was detrimental and antagonistic to plaintiff's interests and should not have been accepted by him because of his conflicting interests, and W. R. McKelvy was at all times aware of plaintiff's precarious financial condition and of the facts pertaining to the Macris' default, "and having worked in close harmony with the attorney for the three Macris, said attorney having formerly been associated in the same office with McKelvy."

What that means I do not know, but I think he means that Mr. Tom Holman represented someone in that lawsuit. Mr. Tom Holman used to be a member of Roberts, Skeel & Holman. That is the only thing I can judge, which was completely off the record, but you have to get off the record to get some sense out of this thing.

That the damages were the direct and proximate result of W. R. McKelvy's breach of contract and "were the direct and proximate result of the concerted conspiracy of defendants and each of them to injure, damage and defraud plaintiff."

Then Paragraph III alleges damages to be general damages to the credit, business, reputation,

serious monetary damage in preparation and conduct of litigation in Yakima, and loss of time in preparation and conduct of litigation. That is all there is on damages.

In the next cause of action, he asks for punitive damages and he asks for damages in the total sum of \$2,000,000.00. I went over this complaint time and time again, and I took the trouble to make this analysis for my own convenience and attached it to the memorandum for the convenience of all counsel and the Court.

I couldn't see where there was any cause of action at all under any theory. It seems to me that what he said, that he came to McKelvy and employed McKelvy to bring a suit against the Macris, and after some time, we don't know how long, McKelvy told him he couldn't represent him, but before any suit was instituted against the Macris; and that then he went to another attorney and brought a lawsuit in Yakima and was successful. There is no question that McKelvy was ever involved in the litigation at all. He did not represent Continental; he did not represent any of the parties in that litigation. There isn't any allegation in the complaint, and actually the facts are that he wasn't associated in any way with that litigation.

Continental apparently bonded the Macris and Schaefer sued the Macris and of course Continental and got a judgment, I think in the sum of around \$50,000.00, a very substantial judgment, and the defendants in that lawsuit appealed and judgment was

affirmed and Continental paid a draft and he got his money.

The only way to bring all these people in together on this would be on some sort of theory of conspiracy, and that is the first thing. He uses the word conspiracy, so I presume that was what he was trying to do. So I then, for his education, prepared a memorandum as to what conspiracy is. You have to have a combination of individuals in some manner to do an unlawful act or to do a lawful act unlawfully with a malicious intent. A conspiracy itself—there is no such thing as an action for conspiracy. It is only for the damages resulting from a conspiracy. There is no allegation of damages for any conspiracy here except a general allegation, and that is not sufficient.

Probably the Court remembers the famous Edith Ransom cases. Judge Neterer wrote two very strong, very clear opinions, apparently opinions written so that the lay person who was not represented by counsel would understand those cases.

In the first one, he pointed out that in that case she did allege causes of action of libel, of assault and various other things, but not a conspiracy, and he said there was no allegation of conspiracy but the fact that she alleged in it that the individuals, the employees of the two navigation companies, had conspired.

If you recall, she complained that they shanghaied her from Yokohama or Honolulu and shipped her over on two steamship lines to Seattle, and gave

her a shot of something or other to quiet her, and that she was shanghaied to Seattle. In one of those Ransom cases, the Court cites another case that Judge Neterer wrote, Puget Sound Power and Light Company vs. Asia, 2 F. (2d) 491. In that case they talked about the cause of action being based on a conspiracy to bring litigants to sue these people, and the Court said that a person fancying a right could sue and the law does not inquire into the motives, and that there has to be language in the complaint which alleged facts which lead to the inference that there was a conspiracy; that the word conspiracy is impotent in itself, that it is necessary to allege facts from which a natural inference is that a conspiracy existed.

That does not exist in this complaint. The fact that he employed McKelvy and McKelvy didn't do what he told him to is not a conspiracy with anybody, and there is no conspiracy alleged. There has to be a conspiracy to defraud that is malicious, intended to be malicious, and has to refer to conduct of the future, not past events. As Judge Neterer said, a conspiracy has to do things to be brought about and is a stranger to things that have passed.

There isn't a single fact alleged in this showing that the defendant McKelvy or any of the other defendants conspired with each other to do any injury at all to the plaintiff. The only allegation is that McKelvy didn't divulge that he represented Continental until October 20, 1945. If this is a cause of action in conspiracy, your Honor, it is barred

dressed to that proposition so far as the defendant McKelvy is concerned.

If he is attempting to allege a breach of contract, then that cause of action is barred by Sec. 159, three years from the breach, which, of course, occurred not later than October 20, 1945. If he is alleging a cause of action against McKelvy—I am talking about just defendant McKelvy—in fraud or malpractice, negligence, that cause of action is likewise barred by Sec. 159; and so far as a cause of action of fraud is concerned the facts were disclosed to the plaintiff Schaefer October 20, 1945, when he was advised by McKelvy that he could not represent him in litigation because of his prior association with Continental Casualty, and so all the facts so far as McKelvy is concerned, he had at that time, and if there were any fraudulent acts they were accomplished at that time, and the Statute of Limitations runs from that date.

But forgetting the Statute of Limitations, there is no cause of action in fraud. The only possible cause of action is for non-disclosure of the fact that McKelvy had an association with Continental Casualty which would make it impossible for him to represent Mr. Schaefer. Non-disclosure can of course be the basis of an action in fraud, but non-disclosure must be intentional and there is no allegation here that it was intentional. But if it was, there still would be no cause of action in fraud, because there is no casual connection between any fraud and the injuries shown.

He alleges, according to his complaint, a lay person can very well determine that he benefited by getting another counsel, as is not certain that McKelvy would have won his lawsuit.

Closely allied with that is the proposition that fraud without damage is not remedial. I think the case that most closely resembles this so far as application of the principle concerned is *Miller vs. Williamson*, 128 Wash. 124, a much stronger case. In that case a man guilty of fraud sold a man a note which had not been secured for good consideration. It was unquestionably a fraudulent transaction all the way through, but the plaintiff alleged that he took the note without notice of the fraud inherent in the note or fraud of any kind, and the Court said he pleaded himself out of court because he pleads himself to be a holder in due course, a bona fide holder in due course and could sue and collect on the note, and therefore he was not damaged.

In the case of *Feldesman vs. McGovern*, and, I think, the *Easton* case point out where there was a suit against a lawyer, that there was no allegation that a different result would have been obtained had the lawyer not been guilty of the act alleged.

In the case of *Feldesman vs. McGovern* the lawyer neglected or concealed the fact that he did not file a petition in bankruptcy and the complaint was demurrable because there was no allegation that if the petition had been filed it would have been granted.

There is another case, a like case, in which the Court held that there being no allegation that the

litigation would have been any different, there was no cause of action alleged and the complaint was demurrable. In *Easton vs. Chaffee*, 16 Wash. (2d) 183, a more or less modern case, the complaint alleged that the lawyer gave a man a paper and said it was an authorization to go before the commissioners when in fact it was a complaint, and the Court said he was not damaged by that, therefore, there was no cause of action. In that particular case, he would have to show that the lawyer misinformed him as to his rights and did it intentionally and deliberately.

As I recall, in that case the lawyer told the client that there was a lien or some assessments which he would have to pay, while the fact that the property going through a tax sale or a sale of that kind, the lien or taxes had been eliminated, and that was the only damages, and that not being alleged, there would be no cause of action.

There can be no cause of action in fraud because there is no damage alleged, and further, there is no fact showing that what McKelvy did inured to his injury in any particular.

The Court: I am sorry, I am going to have to interrupt you again. This morning for the first time I heard of this case. I did not know this case was going to be on today. I notice one of the defendants is a local lawyer, and I notice it is said that the plaintiff is a resident of Oregon and is a layman so far as the practice of law is concerned and is not represented by an attorney.

I would like to advise all connected with this case that we do have sitting in this court today and expected to continue during the next two weeks a visiting judge from Sacramento, California. I would like to ask the plaintiff if he would like this case heard before that judge. His name is Judge Lemmon. The case involves a local lawyer and a non-resident plaintiff not represented. Would that plaintiff like to have the case heard by a non-resident judge, a judge who does not live in the State of Washington?

Mr. Schaefer: No, Your Honor.

The Court: Are you sure that you will be as well satisfied with the result——

Mr. Schaefer: I believe so.

The Court: ——with me sitting on the case as if Judge Lemmon from Sacramento sat on the case?

Mr. Schaefer: I believe so, Your Honor.

The Court: Have you any objection to Judge Lemmon hearing the case? Will you consult with any friend or consider it with your wife while we have a short interruption for another matter? Sometimes litigants after litigation is finished look backward and have certain regrets about the procedures. I do not know of any reason why I could be disqualified or am disqualified to hear the case, but I advise the plaintiff, who is said to be a resident of Oregon and is not represented by an attorney, that one of the defendants is said to be a local lawyer. That lawyer sometimes appears in this court. Do you think—do not answer the question now, but I want you to consider it—do you think after the

case is over you will be just as well satisfied to have had the case heard before a local judge in whose court one of the defendants appears as a lawyer as you would to have the case heard before a visiting judge who is a resident of Sacramento, California, who may not know of and may not in the past have had appearing in his court anyone connected with this case?

That is the question you should consider, and I wish you to let me know your mature thought about it in a few minutes. I could arrange to have this case heard by Judge Lemmon, I believe, within the next two weeks. An interruption is taken in this case so that you may consider what you prefer. It would be satisfactory to me to try to arrange with Judge Lemmon for him to hear this case and dispose of it. I do not know what attitude the plaintiff and others connected with the case would have.

Mr. Schaefer: Your Honor, I think I will be very well pleased to have you keep right on with the case.

The Court: Do you think that no matter what the outcome of the case may be, you will feel the same afterwards?

Mr. Schaefer: I believe so.

Mrs. Curry: Your Honor, if you are not well, I was thinking this could be postponed.

The Court: Is your residence now in Portland, Mr. Schaefer?

Mr. Schaefer: Yes, Your Honor. If you are not well, as far as I am concerned I wouldn't like to put you to any inconvenience.

The Court: My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments, and I do not know how long my cold is going to last, I am inclined to feel for that reason I should ask Judge Lemmon to hear the case, and he will arrange a time in the future when he would be able to hear it.

Mrs. Curry: Your Honor means by "the case," the motion?

The Court: I mean the whole case. Judge Lemmon is like any other judge; he will hear counsel in respect to their convenience about future hearings, if any, to be had.

Mrs. Curry: What if he goes down South?

The Court: I think the visiting judges usually consider all of those eventualities. I do not wish to place any limitations upon jurisdiction to handle the matter.

Mrs. Curry: I was thinking that it might work out to everyone's convenience to continue this for a week until you are feeling better.

The Court: I think the contingency of my cold is such that I should ask Judge Lemmon to hear it. Unless there is some objection to Judge Lemmon hearing it, I would like to make arrangements for him to do it.

Mr. Schaefer: I wouldn't have any objection, Your Honor. I would leave that up to you.

The Court: If you have no objection, I wish you would wait a few minutes for me to see if Judge Lemmon will take the case. Court is recessed for five minutes.

(Recess.)

The Court: I ask those connected with this case to come back at 1:30 to see if at that time I can contact Judge Lemmon. I will see what his attitude is about taking the case. I rather expect he will be agreeable to taking it. All those connected with the case are excused until 1:30 o'clock this afternoon, and the Court is recessed until that time.

Further Proceedings at 1:30 o'Clock P.M.

The Court: For the information of litigants and counsel in the Schaefer case, No. 2673, I advise you that Judge Lemmon has consented to a transfer of this case before him, and I am going to volunteer this statement about the matter for whatever it is worth to you. I know a great number of trial judges in the Ninth Circuit, and if I were a party to an action like this, either the plaintiff or one of the defendants, I do not know any one of the judges on the Federal Bench before whom I would feel more content to leave my case for decision than I would before Judge Lemmon. I do not know your view, but that is mine.

Judge Lemmon has also consented that you appear before him in his courtroom just before 2 o'clock p.m. today with a view to finding out from him when he can proceed with this hearing.

Mr. Schaefer, do you consent to this transfer?

Mr. Schaefer: I do, Your Honor.

The Court: Do each of the defendants so consent?

Mrs. Curry: Certainly, Your Honor.

Mr. Croson: Yes, indeed.

The Court: It is ordered that this case be——

Mr. Croson: Before Your Honor issues that order, might I request that Your Honor pass on the question of bond?

The Court: I think Judge Lemmon should do that. I prefer that he act on all the issues.

It is now ordered that this case, No. 2673 in this court, be and is now transferred to the calendar of Judge Dal M. Lemmon, a judge of this court by assignment and designation entered by means of an order signed by the Chief Circuit Judge of this Circuit, for any and all further proceedings which may occur in the case, and that means that the assignment from this court to Judge Lemmon is for all purposes. If there are any proceedings not completed by Judge Lemmon during the period of his assignment, Judge Lemmon thereupon will have power to make arrangements for further proceedings in the case.

Mrs. Curry: That is the only thing I was concerned about. I didn't want the litigation tied up, having to wait until the judge would come up here. If he has authority to transfer to another court for any other purpose, I would be quite satisfied.

The Court: He has just as much authority to send it to another judge as I have to send it to him.

Mrs. Curry: I didn't know whether that was so after a ruling.

The Court: I am certain of that. I have no doubt of it. In other words, he has full and complete authority with respect to the case just the same as I had before I announced this order a moment ago.

All of you might be interested to read the statute relating to the assignment to one district of judges from other districts, and particularly with reference to what continuing authority they may have in cases not completely finished by them during the stated periods of their assignment.

I will say to you that I am sorry that you had to spend all of this time before I realized that I felt these arrangements should be made. I did not know this case was on the calendar until this morning, and, of course, I did not realize the time that was involved in the matter.

I do wish to assure you that the principal reason I have for asking you to consent to this assignment is because I think it could on these motions involve not only today's work but very considerable additional time, and I have already enough work under advisement on my desk. I do not know how long this cold I have is going to last, and I thought, out of consideration for you, I should do what has been done, and I understand that all of you consent to it.

You may now be excused.

[Endorsed]: Filed Jan. 29, 1951.

[Title of District Court and Cause.]

ORDER OF DISMISSAL AND REQUIRING
COST BOND

This matter coming on regularly for hearing before the undersigned Judge of the above-entitled Court upon the motion of the defendant, W. R. McKelvy, for an order to dismiss the above-entitled action as to said defendant and for a bond by plaintiff for security of costs; and the court having heard the argument of counsel for said defendant and the argument of the plaintiff per se and being fully advised in the premises does hereby find that said motion to dismiss should be granted upon the grounds and for the reasons that the complaint fails to state a claim against said defendant and the cause, if any alleged, has been barred by the statute of limitations of the State of Washington and that the plaintiff be required to file a bond for costs, Now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff be and he is hereby required to file a bond for costs in this court in the sum of \$250 on or before January 26, 1951; and

It Is Further Ordered, Adjudged and Decreed that defendant, W. R. McKelvy's motion to dismiss be and the same is hereby granted and the said action as to said defendant be and the same is hereby dismissed with the privilege to the plaintiff to amend the complaint herein within 30 days from

the hearing of the motion, to wit, within 30 days from January 11, 1951.

Done in Open Court this 7th day of February, 1951.

/s/ DAL M. LEMMON,
Judge.

Presented by:

/s/ A. P. CURRY,
Attorney for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 7, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 2673

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTINEN-
TAL CASUALTY COMPANY, a Corporation;
A. J. GOERIG and CLYDE PHILP, Indi-
viduals,

Defendants.

ORDER OF DISMISSAL AS TO DEFENDANT
CONTINENTAL CASUALTY COMPANY

This Matter having come on regularly on January 11, 1951, before the undersigned Judge of the above-entitled Court upon the Motion of the defendant Continental Casualty Company, a corporation, for dismissal of the above-entitled action as to the defendant Continental Casualty Company; the plaintiff being present in Court and being represented per se; the defendant Continental Casualty Company, a corporation, being represented by Carl E. Croson and Willard Hatch, its attorneys of record; argument having been heard; the Court being advised in the premises; and the Court having heretofore entered its oral decision on the 11th day of January, 1951, to the effect that the above-enti-

tled action should be dismissed as to the defendant Continental Casualty Company, a corporation, for the reason that the Complaint of the plaintiff fails to state a cause of action against this defendant upon which relief can be granted, and for the additional reason that the above-entitled action is barred by the applicable Statute of Limitations as to this defendant; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed:

That the above-entitled action be and the same hereby is dismissed as to the defendant Continental Casualty Company, a corporation; and that the plaintiff be and he hereby is granted until February 10, 1951, time in which to file an Amended Complaint herein against said defendant.

Done in Open Court this 7th day of February, 1951.

/s/ DAL M. LEMMON,

Visiting District Judge.

Presented by:

/s/ CARL E. CROSON,

/s/ WILLARD HATCH, of
CROSON, JOHNSON &
WHEELON,

Attorneys for Defendant Continental Casualty Company, a Corporation.

[Lodged]: January 13, 1951.

[Endorsed]: Filed and entered February 7, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS NON-RESIDENT

Know All Men by These Presents:

That the undersigned plaintiff, M. C. Schaefer, has deposited with the Clerk of the above-named court the cash sum of Two Hundred Fifty Dollars (\$250.00) on this date, January 17, 1951.

Whereas, Plaintiff in the above-entitled action is a non-resident of the County of King and as such is required to provide security for costs and fees which may be awarded against him.

Now, Therefore, if M. C. Schaefer shall pay or cause to be paid all fees that must by law be paid to the Clerk, Marshal, or other officer of the Court and all costs of the action, which they may be required to pay, not exceeding the said sum of Two Hundred Fifty Dollars (\$250.00), then this obligation shall be void; otherwise to remain in full force and effect.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed January 17, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT

I.

Jurisdiction is founded on diversity of citizenship and amount.

Plaintiff is a resident of the State of Oregon, and Defendants are all residents of the State of Washington, except the Defendant, Continental Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds \$3,000.00.

II.

Plaintiff at all times herein complained of and for many years prior thereto, has been engaged in business as a Concrete Contractor and General Contractor.

III.

That during all the times herein complained of, beginning on 3/2/44 and ending on 8/18/50, Plaintiff suffered substantial damages, hereinafter more fully alleged, as the sole and proximate result of the overt acts (hereinafter alleged in detail) of defendants who did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure, defraud and damage Plaintiff.

(1) 12-7-1943: Macri Company signed the general contract with the Bureau of Reclamation.

(2) 12-7-1943: Clyde Philp, one of the Defend-

ants herein, signed as attorney-in-fact for the Continental Casualty Company, the performance and payment bonds posted by defendants Macri, and four days later, or on 12-11-1943, this same Clyde Philp, together with A. J. Goerig, entered into a silent partnership agreement with each other, and as joint venturers with the Macris in connection with the above-mentioned contract with the Bureau of Reclamation being job specification #1062 and also accepted the conditions of the bonds that had been posted by the said Macris, substantial copy of each of which said bonds is as follows:

Performance Bond

(Construction or Supply)

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-five thousand and 00/100 (\$65,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated

December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of

Niels H. Hjorth,

3739 Burns St., Seattle, Wn.

/s/ DON MACRI,

905 Tenth Ave. So.,

Seattle 4, Wash.

In the presence of

Niels H. Hjorth,

3739 Burns St., Seattle, Wn.

/s/ JOE MACRI,

905 Tenth Ave. So.,

Seattle 4, Wash.

In the presence of

Niels H. Hjorth,

3739 Burns St., Seattle, Wn.

[Seal]

CONTINENTAL CASUALTY
COMPANY,

Box 534, Yakima,

Washington.

By /s/ CLYDE E. PHILP,

Attorney in Fact.

Attest:

ELLA HOLT.

Payment Bond

(Construction)

Pursuant to the Act of Congress, Approved August 24, 1935—49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri, and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-four thousand two hundred seventy-five and 48/100 (\$64,275.48) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized

modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of
 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

 /s/ DON MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of
 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

 /s/ JOE MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

Niels H. Hjorth,

3739 Burns St., Seattle, Wn.

[Seal]

CONTINENTAL CASUALTY
COMPANY,

(Corporate Surety.)

Box 534, Yakima,

Washington.

By /s/ CLYDE E. PHILP,

Attorney in Fact.

Attest:

ELLA HOLT.

The rate of premium on this bond is xxxxx per thousand.

Total amount of premium charged, \$ premium included in performance bond.

(3) Plaintiff did not know of these facts until after suit was filed in Yakima, Washington, or, on or about 1-17-1946.

(4) 3-2-1944: Received a letter from Macris' Job Superintendent, George Staples, asking Plaintiff for a bid on the concrete work for this job, being job specification No. 1062.

(5) 3-14-1944: The Plaintiff herein signed a sub-contract with the Macris in connection with this job specification #1062 pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza Irrigation Project near Yakima, Wash-

ington. Plaintiff posted bonds as required, and within the times stipulated entered into performance of said sub-contract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications.

(6) 4-21-1944: Plaintiff herein entered into a second sub-contract with the said Macris for similar work, said work being an extension of the work sub-contracted on 3-14-1944—this contract was on job specification #1068. Plaintiff was not required to post bond on this job. The said Macris had Plaintiff sign a sub-contract on this job on 4-21-1944, but unknown to Plaintiff said Macris at that time did not have a contract with the Bureau of Reclamation but signed a contract with the Bureau of Reclamation on or about 5-18-1944. The Defendants, Clyde Philp and A. J. Goerig, were also silent partners with the Macris on this job, being job specifications #1068. The general contract between the Macris and the Bureau of Reclamation on job specification #1068 called for work to commence within 30 days of the signing of said contract, but the general contractor did not commence any work for many months after the expiration of the 30-day period; in fact, Macris had not done any excavating and grading for structures on this job until in January of 1945 and none of said excavating and grading for structures on this job were ever done per plans and specifications. Defendants Macri, and Defendants Philp and Goerig, and Continental Casualty Company through its agent and attorney-

in-fact, the Defendant Philp, were attempting from the beginning of said sub-contract to bankrupt Plaintiff, ruin his reputation and credit, by not paying Plaintiff as per contract requirements, by not performing their part of the work, or else performing it badly, thereby increasing cost to Plaintiff and hampering and delaying Plaintiff and exhausting Plaintiff's operating capital.

(7) 4-29-1944: This is the date of the first big meeting in the field on job specification #1062 (after Sam Macri deliberately failed to keep an appointment on 4-28-1944). Memorandum of which was prepared immediately after said meeting and later delivered to Defendant McKelvy. See (16).

(8) 5-18-1944: Macris signed contract with the Bureau of Reclamation on job specification #1068 (see second paragraph hereabove under date of 4-21-1944 for additional details). Had Macri Company asked Plaintiff to sign a sub-contract on this job specification #1068 in the customary sequence which would then have been on or after 5-18-1944, Macris would have failed to have Plaintiff enter into said sub-contract as this was after the argument in the field on 4-29-1944.

Plaintiff did not perform any work on this job #1068.

(9) 5-22-1944: On this date Plaintiff withdrew all except two (2) of Plaintiff's men from job specification #1062 because of the defaults of said Macri's in not supplying the required lumber and

excavations. Plaintiff left these two (2) men on the job so that the Macris could not charge Plaintiff with having abandoned the job.

(10) 6-15-1944: This is the date of the second big meeting in the field on job specification #1062. Memorandum of which was prepared immediately after said meeting and later delivered to Defendant McKelvy. See (16).

(11) 6-29-1944: Plaintiff returned additional men to Job #1062.

(12) 7-15-1944: This is the date on which it is alleged that an agreement terminating the joint venture between the Macris and the silent partners Clyde Philp and A. J. Goerig was signed. This termination agreement, of course, was effective as to the Plaintiff but not effective as to the Continental Casualty Company, the Bonding agent. The following is a copy of the termination agreement as recorded in the transcript of record in the Yakima suit: Volume 1—Pages 52 to 58 Inc. Agreement terminating Joint Venture.

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

1. A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

2. Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

3. Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels, Roza Division, Yakima Project Washington.

4. Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

5. The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as

the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, 1, 2, 3, 4, and 5, are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

1. It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete

and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52 $\frac{1}{3}$ % thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

2. As to Project 5, this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. (39)

3. Second parties shall pay to first party, as soon as the amount is ascertained, the equipment

rentals for the first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project 5, as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project 5.

4. In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project 1, known and designated as "Val Vue Real Estate Development."

5. It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second parties upon Project 5 are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00 is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

6. It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. (40)

7. It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

8. It is further understood and agreed that this arrangement as hereinbefore specified between the

parties is done and accomplished in a spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

9. In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,
By DON MACRI,
One of Said Firm, But Authorized to Act in This
Matter for It, First Party.

CLYDE PHILP,
A. J. GOERIG,
Individually and d/b/a Goerig & Philp and/or A. J.
Goerig Construction Co., Second Parties.

[Endorsed]: Filed July 5, 1946. (42)

(13) Plaintiff did not know of these facts until after suit was filed in Yakima, Washington, or, on or about 1-17-1946.

(14) 7-31-1944: Date Plaintiff was first able to pour concrete on this job specification #1062 despite the fact that Plaintiff had an oral agreement that the Macris would facilitate their own work so that Plaintiff could be through with all of Plaintiff's work on both of these jobs, specifications #1062 and #1068, by September 15, 1944. This oral agreement was entered into at the time of the signing of the sub-contract on job specification #1068. It was affirmed right after the signing of this said contract and a number of times thereafter up to the time of September 15, 1944, and thereafter Plaintiff has made the statement that such an agreement existed and the Macris have admitted the same.

That said conspiracy was joined by Defendant McKelvy on 11/1/44 and furthered by him as more fully appears from the following facts:

(15) 10-31-1944: Mr. Colomb of Glens Falls Indemnity Company, Plaintiff's Bonding Company, came to Plaintiff's office in Portland, Oregon, and in the course of their conversation, Mr. Colomb asked Plaintiff if he had an attorney to handle Plaintiff's proposed suit against the Macris & Continental Casualty Company. Plaintiff stated that he had a local attorney, but as of that time his Portland attorney had not yet contacted an attorney in Washington, and that Plaintiff was preparing the necessary data to present to such Washington attorney. Mr. Colomb asked if he could suggest an attorney in Seattle. Plaintiff said, "yes, I will appreciate it if you do." Mr. Colomb then suggested that Plaintiff contact Mr. McKelvy of the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann and wrote an introduction on the back of his card and said, "I'll give him a call and let him know you are coming up to see him." Plaintiff said, "O.K.," so then Mr. Colomb called the McKelvy office and told someone of that office that Plaintiff would be up to see him in regard to filing a suit against the Macris in connection with a sub-contract on work on a job near Yakima.

(16) 11-1-1944: On or about this date Plaintiff employed Mr. McKelvy to file a lawsuit in Quantum Meruit against the Macris and the Continental Casualty Company on job specification #1062 Roza

Project, Yakima, Washington, and to terminate the second sub-contract on job specification #1068 because of Macris breaches of said contract, specification #1068. Plaintiff at this time made full disclosure of Plaintiff's financial condition; the defaults of said Macris in not making the required payments to Plaintiff, of the verbal agreement that Plaintiff was to be able to complete both contracts, Job specifications #1062 and #1068 by September 15, 1944, of Macris defaults in not furnishing suitable materials, in not supplying said materials timely, in not properly performing the excavating and grading, in not doing said excavating and grading timely and showed Defendant McKelvy pictures of the poor grade of lumber and pictures of the incorrect excavations.

Plaintiff informed Defendant McKelvy that the Macris were bonded by Continental Casualty Company with both performance and payment bonds. Plaintiff further informed Defendant McKelvy of the following: that the Macris had signed the general contract with the Bureau of Reclamation on job specification #1062 on 12-7-1943, that on or about 3-2-1944 Plaintiff received a letter from Macris' job superintendent, George Staples, asking Plaintiff for a bid on the concrete work for this job specification #1062, that the Plaintiff herein signed a sub-contract with the Macris in connection with this job specification #1062 pursuant to the terms of which Plaintiff was to build forms, place reinforcing steel, pour and finish certain concrete work on the Roza

Irrigation Project near Yakima, Washington, Plaintiff posted bonds as required, and within the times stipulated entered into performance of said sub-contract and with diligence pursued said work in conformity with the terms of the contract and the plans and specifications. That the Plaintiff herein signed a second sub-contract with the Macris for similar work, said work being a Roza Project extension of the work sub-contracted on 3-14-1944, and this contract was on job specification #1068. That Plaintiff was not required to post bond on this job. That the Macris had Plaintiff sign said sub-contract on this job on 4-21-1944 and Macris at that time did not have a contract with the Bureau of Reclamation, but signed a contract with the Bureau of Reclamation on or about 5-18-1944. That the contract between the Macris and the Bureau of Reclamation called for work to commence within 30 days of the signing of said contract, but that the Macris had not yet started any excavating for structures, and that had the Macris asked Plaintiff to sign the sub-contract on this job specification #1068 in the customary sequence which would then have been on or after 5-18-1944 Macris would have failed to have Plaintiff enter into said sub-contract, as this was after the argument in the field on 4-29-1944. Plaintiff also informed McKelvy that all except two of Plaintiff's men were withdrawn from this job specification #1062 on 5-22-1944 because of lack of lumber and excavations. That Plaintiff left these two men on the job so that the Macris could not charge Plaintiff with having abandoned the job and that

Plaintiff returned additional men to the job on 6-29-1944 and that the first day Plaintiff was able to start pouring concrete was 7-31-1944.

That in the first part of May, 1944, Mr. Davis, a superintendent for Sather Construction Company, who was also doing some construction work on the Roza Project, had advised Plaintiff and his brother Wm. E. Schaefer that we should watch our P's and Q's as we were sub-contracted to a ruthless outfit if there ever was one. Mr. Davis said, "I'll bet you are bonded to the Macris." Plaintiff said, "What makes you think so?" Mr. Davis said, "I just know so. That is the way they operate. They will break you and then go in with their own crew and do the work that you contracted to do and charge the cost of that part of the work and add in a lot of the cost of the work that they themselves were to do on their own part of the work and send the bill to your bonding company. Your bonding company will then pay them and turn around and wipe you fellows out of business."

That about July 15, 1944, a friend of Plaintiff's, Mr. John E. Walker, then of Spokane, Washington, came to Portland to inform Plaintiff that he had heard that Macri Company was attempting to break Concrete Construction Co. out on the Roza job near Yakima, Washington, that he had been informed by a man that said he was a foreman for a construction company doing work on the Roza Project. Plaintiff at this time gave Defendant McKelvy copies of sub-contracts and specifications on job specifications #1062 and #1068, and letter of Sep-

tember 18, 1944, which is a copy of a letter from the Bureau of Reclamation office at Yakima addressed to Macri Company with copies to Continental Casualty Company and Concrete Construction Company. Copy of said letter follows to wit:

“Reference is made to paragraph 23 of Specifications No. 1062 and to paragraph 21 of Specifications No. 1068, for which you hold the performance contracts.

“Under the provisions of the above-mentioned paragraphs, we wish to call your attention to the fact that the work under these specifications is not being prosecuted with sufficient equipment and forces to insure completion by the completion date of both contracts.

“In the absence of specific information to the contrary, it is assumed that the sub-contractors now engaged on Specifications No. 1062 will also perform similar work on Specifications No. 1068. If this is the case, the Concrete Construction Company will need to construct 500 structures on Specifications No. 1062 and 786 on Specifications No. 1068, or a total of 1,286 structures. Our records indicate that this company completed 87 structures last month and only 36 structures to the 13th of this month, for a total of 123 structures.

“Considering both contracts together, and from this date forward, at least 185 structures will need to be completed per month with no time allowance for winter weather conditions, if the work is to be completed within the contract completion dates.

Obviously the rate of placement of concrete structures will need to be greatly increased to meet such a schedule and you are requested to immediately take the necessary steps to bring both jobs up to schedule. Frankly, your facilities now on the job to date are not sufficient to complete Specifications No. 1062 and we cannot understand how you expect to perform the work on Specifications No. 1068 without increasing the present facilities or bringing in an independent organization to complete Specifications No. 1068

“We wish to also call to your attention that, of the 90,000 l.f. of concrete pipe of all sizes to be laid on both schedules, only a little better than 9,000 l.f. have been laid to date. The 9,000 l.f. now in place have been laid by a succession of sub-contractors of whom the last was definitely not a qualified pipe layer. You are requested to immediately resume pipe laying operations with a sufficient force of qualified pipelayers so as to insure completion of this work during favorable weather conditions.

“We cannot accept labor conditions as a prime cause of these delays for the reason that all of our other contracts now in force are ahead of schedule. We have been advised that a considerable part of these delays are due to protracted negotiations with prospective sub-contractors rather than to an aggressive prosecution of the work.

“Very truly yours,

“H. T. NELSON,

“Construction Engineer.”

Defendant McKelvy told Plaintiff he did not think it would be necessary to bring suit since Macris' attorney, Mr. Holman, had been in their office for a number of years and that although Mr. Holman was not associated with another office, they were still cooperating as if he were still with their office; that they were just like that (indicating by putting his second finger over the index finger), and that if things did not work out right that way we would then go ahead with a suit. Defendant McKelvy then had Mr. E. L. Skeel the senior partner of the law firm come into his office and related some of the things Plaintiff had told McKelvy. Mr. Skeel said that he couldn't see how we could hold the Casualty Company and we could probably only hold the Macri Company if we have absolutely segregated costs as "this is in the contract" and "that is outside of the contract." Plaintiff then said, "That is impossible in a situation like this. None of the excavations were made to specification. They were all excavated tight so one can not segregate the time required to set and strip forms in these excavations from the time it would require to set and strip forms in excavations dug to specifications, or make that kind of segregation on any other part of the work." Plaintiff also delivered to Defendant McKelvy the memoranda of meetings on 4-29-1944 and 6-15-1944, items (7) and (10), of which the following are substantial copies:

We, Wm. E. Schaefer and M. C. Schaefer, had an appointment with Sam Macri for 10:00 a.m.,

4-28-44, at the job office. Macri did not show up. George Staples, Superintendent for Macri & Company, came in from the field in the afternoon. M. C. Schaefer asked him to locate Macri. Staples called Seattle but did not reach Macri and the Seattle office did not know where he was. Staples then said, "I believe Macri is going to quit interfering with my program, forcing me to lay off men, saying you've got too many men, the pay roll is too big, lay them off, and if he doesn't, I don't think I'll be here long, and I'm going to put on sufficient help and see that the excavating will be done according to specification."

M. C. Schaefer said, "That's not enough. You get hold of Macri and see that he shows up tomorrow before noon or we'll start gathering our equipment and pull off the job starting at noon."

Staples said, "Don't do that, Matt. In the future I'll see that you don't have to wait for anything. I'll get in touch with him." He then called Yakima and talked to Macri.

The next day Macri, W. E. Schaefer and M. C. Schaefer met at the office and drove to the field. We stopped at Structure #18. Fred Waltie (our superintendent) and George Shular, a form setter, were excavating. M. C. Schaefer had them stop excavating. Waltie then sent Shular to the yard to work. Waltie then came with us to check the excavations. We checked approximately 6 or 7 holes and they were all off.

Macri said, "Well, we are just getting started.

You've got to expect some of this at the start, and you are supposed to do some grading .2 or .3."

M. C. Schaefer said, "Oh no, we don't have a thing to do with it, but you are trying to shove it onto us, and that's what we're here about."

Macri said, "All right, we'll get the excavating right from now on." Turning to Staples he said, "You get the men in here and get this grading done." Then looking at M. C. Schaefer said, "Or you go ahead with it and I'll pay you for it."

M. C. Schaefer said, "Now just a minute. You know better than that. You get your men in here and see that these holes are excavated per plan and specifications, and that means out 1 foot and on a 1:1 slope, and have sufficient men and equipment here to do it. You told us you would have plenty of equipment and men on the job so that we could go as fast as we wanted to, and here we are killing time laying out for fine grades, excavating, grading, cribbing, backfilling, rebuilding dried-out forms, etc., and not only that but: What are we going to do next week? You get down to business and excavate these holes to the specifications."

Macri said, "You take the excavating item, then you handle it."

M. C. Schaefer said, "No, but if we were doing it, we'd watch our cut banks and elevations and not only excavate out a foot and on the 1:1 slope, but would pull out a couple extra shovelfuls here and there so the finegraders in trimming the cut banks and fine grading could semi-shove the excavating

material into these extra pockets instead of shoveling up on a bank and having the carpenters kick it back into the hole. I'll say the total excavating cost for structures would be less if the excavating were done per specifications than the hand work alone is costing now."

Macri said, "We haven't got the men. This little grading don't amount to anything. Keep track of it, and I'll pay you for it."

M. C. Schaefer said, "That's not all you are going to pay for. You're going to pay for all the extras. What do you think we are? Who do you think is going to pay the extra cost of placing these forms, of stripping them out of such holes as this, wrecking them, and having to haul all the forms back to the yard for repair instead of to structures ahead. We're going no further. If your performance doesn't change, we'll just pull out."

Macri said, "All right, quit arguing. We'll get more men in here, and I'll get another shovel on the job, and we'll get excavations right, and we'll keep out of your way. I'll pay you all extras then, so keep going." He then turned to Staples and said, "Get men in here and get this work fixed up." Staples then left to lay out holes for the shovel.

Back at the office later, M. C. Schaefer said to Staples. "Now what will these promises amount to."

Then Staples said, "Now that's it. Macri passes it onto me. Out in the field he said, 'We will get things on the button,' then he told me later, 'Keep going as you are. Let them excavate .2 or .3,' and

Matt, I'm getting tired of it. I knew yesterday where to reach him, but he said to me not to call him unless I had to. Well, when you said you were going to pull out, I had to get in touch with him. I don't know what to think. Macri is paying my salary, but this buck passing isn't a part of our deal. On the other hand, stick with it. I'll get more men on and get things working as they should or Macri will have to lay me off. I'll not quit. I'll work it out, or he'll have to lay me off."

We, Allyn R. Hunter, Fred Waltie, and M. C. Schaefer, had an appointment with Sam Macri 6-15-1944 at the job office.

We then drove to the field to check the excavations, the conditions of the set forms, etc. Present were Sam Marci, Mr. Cohn, Macris' Engineer; Allyn R. Hunter, Rogers Insurance Agency, Fred Waltie, our Superintendent, and M. C. Schaefer.

M. C. Schaefer pointed out the different errors in the excavating work, the condition of the set forms, etc.

Macri said, "That's nothing to holler about. We just got started here. The rest are better, and we'll get them o.k. from now on."

M. C. Schaefer said, "You point out any that are better." So we went on to check more holes, none were better, but some were worse. M. C. Schaefer pointed out where we had set the outside forms so that Macri's crew would know where to crib and backfill and where they had so backfilled.

M. C. Schaefer said, "This is backfilled, and the

backfill is not puddled, who is to take the responsibility of cracked structures due to such backfilling?"

To which Macri replied, "That's not for you to say. That's up to the inspector."

M. C. Schaefer said, "Yes, but I sure expect to hear about it if the structure cracks. That's a minor detail. The real thing is, when are you going to get these excavations to specification, and I mean excavated out 1 foot and on the 1:1 slope. The way these holes are excavated the slow progress and absolute lack of cooperation on the part of Sam Macri & Company is making our work cost, if continued in the same way, in excess of twice our bid price. Now just when are you going to get men in here and get going? We are tied up now without anything to do on account of there being no holes ready and no material, and we are paying a couple of men so as not to lose them."

Macri said, "Well, you take the excavating item."

M. C. Schaefer said, "No, but as I told you before, if we were doing it, we would watch our cut banks and elevations and excavate per specification, which is out 1 foot and on a 1:1 slope. Plus that, we'd excavate a bit more, if anything, so as to give room for the hand excavators to semi-shove the small amount of hand excavated material then required to be excavated to a side instead of shoveling up on a bank for the carpenters to kick back into the hole again and for the strippers to dig out before they will be able to get the forms out. And

I'll say it again, I believe the total excavating then would cost less than the hand excavating alone is costing now."

Macri said, "You are supposed to do a little grading .2 or .3.

M. C. Schaefer said, "Here we go again, the same old argument, the same old promises over and over again. We don't have a thing to do with it! You better get all that equipment you've been promising for so long in here and the necessary men I've asked that you have clear sailing ahead for us so we can pour at least 20 cubic yards of concrete per day, and I mean every day, and that means at least 80 structure excavations ahead of our pouring crew."

Macri said, "All right, we'll get the excavating right from now on. We'll have an engineer on the job Monday, and we'll get necessary material on the job. So get back and go to work."

M. C. Schaefer said, "Not yet we won't. You get plenty of holes ahead first. Your Superintendent in his letter to us before we figured the job said you would be ready for concrete in about two weeks, and here we are tied up like this."

Macri said, "Yes, you told me Staples was a good man, and he can't handle it."

M. C. Schaefer said, "I've never said anything of the kind, but if he had had a little cooperation from you, he probably would have done better by far."

Macri said, "I'll have an engineer on the job Monday, so quit arguing. We'll get going."

M. C. Schaefer said, "When will you get these holes cleaned up and reexcavated per specification?"

If not soon, you will be doing the forming and concrete work yourself. This expensive operating is at an end right now. You're going to have a big extra bill so far."

Macri said, "I told you I will pay for the extra excavating."

M. C. Schaefer said, "Extra excavating—you're paying for all the extras."

Macri said, "All right. I'll pay all extras. Nobody will lose money on my job. I told you that before, so go to work. I'll have an engineer on the job Monday."

M. C. Schaefer said, "All right. You said you will pay all extras, that you'll have an engineer on the job Monday, and that you will have plenty of material and we won't be stymied again."

Mr. Macri and Hunter walked on ahead and did some talking in a low voice that I did not hear and I doubt that Cohn heard what they were saying.

Mr. Cohn, Fred Waltie, and I were walking approximately 15 to 20 feet behind Macri and Hunter and Mr. Cohn said, "This is no way to do the excavating. It should be excavated per specifications. Macri told me that he wants me to take charge of this job, and if I do, I'll see that things get straightened out and running smoothly. But you can't tell. By the time we get back to Seattle, Macri will probably decide to put someone else in charge."

Mr. Skeel then went back to his office and Mr. McKelvy said: "I will have to study this thing over a bit; however, I think that we can come to a satis-

factory agreement through Holman shortly, or we can then file suit. I'll get in touch with Holman and I should have something for you on this in the next few days.

The following is a photostatic copy of an office memo from Mr. McKelvy to Mr. Kelly of their office. This memo was inadvertently handed Plaintiff together with the return of Plaintiff's papers on October 20, 1945. (The above memo consists of four photostatic pages.)

November 8, 1944.

Mr. Kelley:

Re: Concrete Construction Co. -
M. C. Schaefer, Subcontractor,
Roza Project, Yakima.- Macri & Co., Contractors.

*not here
just
schedules
&
specifications*

Attached are Subcontracts and Contracts Nos. 1 and 2. Mr. Schaefer subcontracted the concrete work on the Roza Division, Yakima Project. No work has as yet been started on Contract No. 2. Contract No. 1 is about one-third completed. The contract terminates on February 8, 1945.

The nature of work being performed is pouring the concrete in building diversion channels and other structures in connection with this Reclamation Project. Macri & Company, general contractors, does the work ahead of the concrete work, so that the speed of the subcontractor is governed by the general contractor.

Schaefer, representing Concrete Construction Company, claims that it is impossible for him to continue with the work; that he has already lost a lot of money; that it will be impossible to complete the work by February 8, due to the fact that the concrete work cannot be done in cold weather, and claims that the reason he has lost money on the job is that Macri & Company has breached its agreement in the following respects:

1. The excavating is being done in a haphazard manner and not according to specifications, making it necessary for Schaefer to excavate before doing his part of the work, at considerable expense; *performance prevented by acts of adverse party*
2. Macri furnishes very poor lumber, -apparently lumber used on other contracting jobs; *see above - same reason*
3. Macri has failed to put enough equipment on the job to keep excavation ahead of Schaefer, with an ordinary crew;
4. Schaefer has not been paid until very late; has still not received his pay for September. (See Article 2 of Subcontract in this connection.); *Good Grounds -*
5. Macri has failed to construct roads so that Schaefer can get equipment around. Schaefer is bonded on Contract No. 1 but is not bonded on Contract 2, which has not yet been commenced. *bonded to Macri is probably not a contractor - notice should be sent owner?*

The evidence which Schaefer has concerning Macri's acts is not specific and satisfactory; nevertheless Schaefer insists that he must collect or go broke. He has had a number of meetings with Macri and the Project Engineer, but nothing has been accomplished.

Cancel & ask quantum meruit recovery? (and loss sustained by others)



-2-

In effect, Schaefer now wants to know how he can throw up these contracts and best protect himself?

Probably Schaefer should notify Macri & Company that he is not going to proceed with the work, outlining various reasons. Also, we should consider the advisability of bringing suit on Contract No. 1 for past and future damages.

Mr. Skeel should call Mat Schaefer, Portland (Lander 4181) and give him our tentative ideas at least on what we think he should do.

McK.

D.

waiver of right 2

Re Arbitration Rule
~~Morison~~ ^{et al} vs Safe Co
 sel case
 81 W 592

106 W 254 + Bishop v Ryan Construction Co.
 Refusal to make a monthly payment
 for hauling on county road work, to
 determine the amount due, constitutes
breach of the contract, warranting a
rescission.

Failure to immediately cancel a
 contract upon non-payment was not
waiver of the right - party could so
 well at any time up to time other
 party offered to make such payment.

130 W 348 Francis v Hoard

Party guilty of first breach of contract
 may be deprived of benefits therefrom, such as profits

71 Pac (2) 30 (wash) Russell v Stephens
 our Supreme Ct differentiates between
 "rescission" and "termination by breach"

"Breach" allows action for damages against
 defaulting party. 5 Page on Contracts # 2878, 3023
 # 3024, # 3027
 also 3 Wellston # 1301-1303, pp 2351-55

1. Call attention to breach

2.

My reason ^{these} of not ~~was~~ ^{we} ~~claim~~ ^{are} ~~we~~ ^{entitled} to ~~claim~~ ^{to} ~~require~~ ^{to} ~~pay~~ ^{pay} ~~for~~ ^{for} ~~costs~~ ^{costs} ~~and~~ ^{and} ~~profits~~ ^{profits}

3. Bill of view &

4. Tender for arbitration

~~As much~~ ^{As much} we ~~entitled~~ ^{entitled} ~~to~~ ^{to} ~~pay~~ ^{pay} ~~cost~~ ^{cost} ~~and~~ ^{and} ~~also~~ ^{also} ~~if~~ ^{if} ~~they~~ ^{they} ~~have~~ ^{have} ~~been~~ ^{been} ~~in~~ ⁱⁿ ~~default~~ ^{default}

if wrong

(17) 11-30-1944: Received letter from the said Macris notifying Plaintiff to proceed on job specification #1068. On this date there had not yet been any preparatory work done by Macris and it was not possible for Plaintiff's crew to do any work on this job.

(18) 1-3-1945: Macri letter to Plaintiff charging Plaintiff with default on job specification #1068 and that they (the Macris) were going to proceed with the work and charge the cost of said work to Plaintiff's account.

On this date there had not yet been any preparatory work done by the Macris and it was not possible for Plaintiff's crew to do any work on this job. All the defendants herein knew these facts.

(19) 1-23-1945: Mr. McKelvy and Plaintiff met with Sam Macri and his attorney, Mr. Tom Holman, at Mr. Holman's office in Seattle. In discussion on payment for excavation, Plaintiff asked Mr. Holman: "What would you say if, as I contend, the payment is for excavation as the specifications read and not for actual excavation as being done by the Macris?" Mr. Holman answered: "I would say then that you have a good legitimate claim against the Macri Company." Mr. McKelvy heard this, and on or about 1-27-1945 received a copy of a letter from the Bureau of Reclamation office at Yakima confirming that the Macris were receiving payment for excavating at one foot out at base of structure and on 1:1 slope as specified and as Plaintiff contended. All the Defendants herein knew these facts.

(20) 1-27-1945: Macri letter to Plaintiff regarding overtime penalty. Copy of letter follows:

January 27, 1945

Concrete Construction Co.

Re: Subcontract No. 1062, Roza Division,
Washington; U. S. Reclamation Job
Specification No. 1062

Gentlemen:

This is to advise you that under the terms of our principal contract all work is to be performed and completed within four hundred days after December 29, 1943. You are therefore advised that any failure to complete your subcontracted work will result in a charge to you of any penalty for delay that may be asserted against us by the United States on account thereof.

A copy of this communication has been mailed to your surety, Glen Falls Indemnity Company, care of Mr. R. F. Owen, Spalding Building, Portland, Oregon.

Very truly yours,

MACRI & COMPANY,
By SAM MACRI.

SM/WW

Registered—Return rec. requested.

(21) 2-9-1945: Defendant McKelvy, Mr. Kelly, an attorney in McKelvy's office; Mr. Hewitt, a civil engineer from Yakima; P. L. Darcy, Plaintiff's superintendent on job specification #1062, and Plaintiff inspected excavations, forms, and lumber on both jobs, specifications #1062 and #1068, and took some pictures of same.

(21-A) 2-13-1945: Date of purported letter from McKelvy to Macri Company. Macris claimed not to have received this letter, and Mr. Kelly of Mr. McKelvy's office said that it was not sent. Copy of letter follows:

February 13, 1945.

Macri Construction Company,
905 10th Ave. So.,
Seattle 4, Washington.

Attention: Mr. Sam Macri

Dear Mr. Macri:

Mr. Matt Schaefer of the Concrete Construction Company has furnished me with an itemized breakdown of his costs already incurred in connection with Contract No. 12r-14825, Specification No. 1062, United States Reclamation Job, Roza Division, Yakima Project, Washington, which cost figures I am herewith transmitting to you. You will note that these are itemized by the month, each page representing a separate month, from March, 1944, to January, 1945, inclusive, together with a recap sheet.

Mr. Schaefer also advised me the other day that he had not yet received a check for his December

work from you. Possibly this has already been forwarded to him by this time.

With reference to your letter of January 27, 1945, addressed to the Concrete Construction Company on the above matter, wherein you advise the Concrete Construction Company that you will charge any penalty assessed by the United States against you to such company, please be informed that our investigation discloses that you have not completed your own work as required under your contract with the United States Bureau of Reclamation in regard to the above project. This work of yours which has not been completed as of this date by you has prevented and is preventing the Concrete Construction Company from finishing up its subcontracting work. Under these circumstances the Concrete Construction Company will therefore refuse to accept your attempt to charge a penalty to that company, which penalty, if any be assessed, would be due to your own failure to comply with the original contract and the subcontract.

In connection with the second subcontract No. 1068, Roza Division, Washington, United States Reclamation Job Specification No. 1068, to which you refer in your letter of January 3, 1945, it appears that you have likewise failed to comply with the provisions of said subcontract.

An investigation of the excavations made by you with reference to such second subcontract, such investigation being made on February 10, 1945, discloses that all of such excavations have been made in a manner contrary to the specifications of such

contract and subcontract. Such specifications provide substantially that an allowance of one foot outside of the outside wall is to be made entirely around the structure, including head walls, and back slopes of 1:1 are to be allowed all the way around from one foot outside of the structure to the ground surface.

This has not been done in any of the excavation work in connection with such subcontract No. 1068 and the excavation has been made sheer on virtually every wall, with little or no allowance, making it impossible to construct forms therein and to do the necessary work preparatory to pouring concrete. This is the same type of defective work that you did in connection with all of the excavation on Contract No. 1062 and the subcontract in connection therewith, which made it impossible for the Concrete Construction Company to proceed with Contract No. 1068 and the subcontract therewith.

At this time, therefore, by reason of such faulty excavation in connection with your work on Contract No. 1068 and the sub-contract therewith, Concrete Construction Company hereby declares that you have breached the provisions of said subcontract No. 1068 and said Concrete Construction Company therefore holds you in default and declares the forfeiture of such subcontract by reason of your breach thereof.

Yours very truly,

W. R. McKELVY.

WRM:MW

Encl.

(22) 4-8-1945: Date Plaintiff finally completed job specification #1062.

(23) Last part of July, 1945: McKelvy showed Plaintiff a clipping from a Seattle newspaper telling of Stephen Macri's thefts from Macri Company by forging checks. McKelvy told Plaintiff: "Everyone knows the kid didn't do it. It is only a coverup of Macris' assets, but he has had his day in court and that's a closed book."

(24) About the 15th of October, 1945: As Mr. McKelvy and Plaintiff were walking up the street in Seattle, Mr. McKelvy told Plaintiff that Plaintiff could not collect from Macris as the Macris had all their assets hidden, that the chances of holding Continental Casualty Company were very slim, and told Plaintiff to turn his business and anything of value over to his brother Bill, a brother-in-law or someone Plaintiff could trust and thereby get rid of the account with Uncle Sam and all other old accounts, and also how he (McKelvy) handled an account for a local contractor and the bank in that case lost approximately \$83,000.00, but he (McKelvy) got their release on it and that the contractor is still doing business. Plaintiff told McKelvy: "My road is a straight road, probably long and rough as hell, but that's the only road I'm traveling, and if it busts me up that is still the way it's going to be done." Plaintiff then asked McKelvy how Mr. Kelly was coming along with the preparation for filing of suit. McKelvy said: "I

think he has got it pretty well ready now. I have been awful busy the last few days but will check with him, I think perhaps it would be well for us to get together sometime within the next week and go over all details together. Meantime, I will check up to see that we have all the details we need and I'll let you know in time for you to look up and bring any needed information up with you."

(25) About October 18th, 1945: Plaintiff had an appointment with McKelvy for 11:30 a.m. at McKelvy's office. (Plaintiff's intention for this meeting was to have a showdown with McKelvy and see what, if anything, was actually being accomplished by McKelvy's office in preparation for the filing of suit, because McKelvy had suggested that Plaintiff make fraudulent conveyance of his assets for which if Plaintiff had followed such advice could have and should have been jailed and the key should have been thrown away.)

Plaintiff met McKelvy, only greeted him, and had a few words but did not get into the subject, when McKelvy told Plaintiff that he had a luncheon speaking engagement and would meet Plaintiff back at McKelvy's office at 1:15 p.m., McKelvy and Plaintiff each went to lunch. Plaintiff was back at McKelvy's office a little before 1:00 p.m. The outer office girl asked if Plaintiff were waiting for Mr. McKelvy. Plaintiff said: "Yes." The office girl said: "Mr. McKelvy isn't going to be in any more today." Plaintiff said, "Yes, he is to be back at 1:15. That was our arrangement just before lunch. I will wait." Then at approximately 1:20

the girl said: "I really don't think he will be back, as he is going to his new home." Plaintiff asked what the telephone number was; the girl said, "I don't know, he has no telephone out there yet." Plaintiff asked what the address was; the girl said, "I don't know." Plaintiff then asked if there was not someone in the office that did; the girl said: "I am sure there isn't." Plaintiff waited until 3:30, then left for Portland.

(26) 10-20-1945: On or about this date Plaintiff herein went to Defendant McKelvy's office in Seattle without previous appointment, because of the fact that Plaintiff had been left sitting the day of the previous appointment with Mr. McKelvy.

Plaintiff at this meeting insisted that Defendant McKelvy state definitely the date that suit would be filed against the Continental Casualty Company and the Macris, and also asked Defendant McKelvy how long Plaintiff yet had in which to bring suit. Defendant McKelvy then for the first time informed Plaintiff that he could not represent Plaintiff in any action against the Defendants Macris and the Continental Casualty Company because Macri Company was a good customer of Continental Casualty Company, who was one of Defendant McKelvy's largest accounts, and that they handled nearly all of Continental Casualty Company's legal work in Washington, and that that which they did not handle directly, they turned over to other attorneys to handle. Then, he told Plaintiff that Plaintiff yet had about a month left within which to file

suit. Plaintiff then asked McKelvy for the name of an attorney in Yakima (this was for the purpose of checking closely and perhaps making sure that he did not hire the attorney suggested by Defendant McKelvy). Mr. McKelvy then named four attorneys in Yakima.

That all the aforesaid acts by Defendants McKelvy were in furtherance of the original conspiracy of Defendants Macri and Philp and Goerig, and Continental Casualty Company through said Defendant Philp and through its attorneys, Messrs. Skeel and McKelvy.

(27) 10-22-1945: On or about this date Plaintiff employed Harry L. Olson of Yakima, Washington, as attorney to do the same things which Defendant McKelvy previously had agreed to do, namely, file a lawsuit against the Macris and the Continental Casualty Company on Job specifications #1062 and #1068 and to do all things necessary to protect Plaintiff in all his rights.

Plaintiff fully informed Olson of all things herebefore in this complaint set forth, including all the details of the wrongs done to Plaintiff by Defendant McKelvy. Mr. Olson told Plaintiff: "Let's take one thing at a time. Let's get this Macri deal out of the way first, then we can take up the other matters. We still have plenty of time to get to that." Olson thereupon promptly investigated the facts of the complaint against Macris and on or about the first day of December, 1945, made a written demand upon Defendants Macris for the payment of sums due Plaintiff for the performance of said work and

gave the said Defendants Macris until the 15th day of December, 1945, within which to meet said demand, said notice specifying that in the event of said Defendants' failure to do so, suit would promptly be instituted for collection of the same.

(28) 12-14-1945: On this date the Defendants Macris, Continental Casualty Company (through its agents Philp & McKelvy and Defendants Philp & McKelvy, personally), in furtherance of their malicious concerted conspiracy, filed a malicious suit in the Circuit Court of the State of Oregon for the County of Multnomah, alleging damages suffered by themselves in the amount of \$40,000.00 by virtue of Plaintiff's alleged breach of said second sub-contract for performance of work on job specification #1068. This suit in Multnomah County, Oregon, was malicious, wilful, without probable cause, and was filed for the sole purpose of bankrupting Plaintiff so he could not file and prosecute his threatened suits in Yakima, Washington, and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, and reducing him to such an impecunious financial condition as to make virtually impossible the filing and prosecution of the threatened suit in Yakima. Plaintiff was in such financial straits that he could not buy any materials without sending a check with the order, and in order to get concrete materials or ready-mix concrete; was forced to buy same through one of his employees who had a maximum credit of \$500.00 and on some occasions when the collections fell short

this employee would borrow the money from a friend for a few days until Plaintiff could make said payment to him.

Plaintiff was constantly being harrassed by his creditors, and within four weeks after the filing of this suit in Oregon Plaintiff had lost fifteen pounds. Copy of said Summons and Complaint follows:

(Summons typed on blank No. 190)

In the Circuit Court of the State of Oregon for the
County of Multnomah

166476

SAM MACRI, JOE MACRI and DON MACRI,
a Co-Partnership, Doing Business Under the
Assumed Name and Style of MACRI COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Busi-
ness Under the Assumed Name and Style of
CONCRETE CONSTRUCTION COMPANY,
Defendant.

SUMMONS

To: M. C. Schaefer, a sole trader doing business
under the assumed name and style of Concrete
Construction Company, Defendant

In the Name of the State of Oregon:

You are hereby required to appear and answer
the complaint filed against you in the above-entitled

action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiffs will take judgment against you in the amount of \$40,000.00, together with interest thereon at the rate of 6% per annum from January 3, 1945, and their costs and disbursements incurred herein.

MAGUIRE, SHIELDS &
MORRISON,

JAMES G. SMITH,

Attorneys for Plaintiffs,
800 Pittock Block,
Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I, James G. Smith, one of the Plaintiffs' Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 14th day of December, 1945.

/s/ JAMES G. SMITH,

Attorney for Plaintiff.

In the Circuit Court of This State of Oregon for the
County of Multnomah

No. 166476

SAM MACRI, JOE MACRI and DON MACRI, a
Co-Partnership, Doing Business Under the As-
sumed Name and Style of MACRI & COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Business
Under the Assumed Name and Style of CON-
CRETE CONSTRUCTION COMPANY,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action
against the defendant, complain and allege as fol-
lows:

I.

That during all times hereinafter mentioned, the
Plaintiffs Sam Macri, Joe Macri and Don Macri
have been and now are co-partners doing business
under the assumed name and style of Macri &
Company with principal place of business at Seattle,
King County, Washington, and with all said part-
ners being residents of said City, County and State.

II.

That during all times hereinafter mentioned the
defendant, M. C. Schaefer, was a sole trader doing

business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

III.

That heretofore and on or about the 18th day of May, 1944, the Plaintiffs entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines and structural laterals and sub-laterals, Roza Division, Yakima project, Washington, according to the terms and specifications in said contract contained and provided, and particularly in accordance with said Specification No. 1068.

IV.

That the said contract above referred to provided that the Plaintiffs might enter into sub-contracts in carrying out the provisions of said contract No. 12r-14996, and on or about the 21st day of April, 1944, the Plaintiffs entered into a written sub-contract with the Defendant, M. C. Schaefer, dealing as a sole trader under the assumed name and style of Concrete Construction Company, by the terms of which said sub-contract the said Defendant agreed to furnish all labor, and necessary equipment to do all the concrete work, form work, cut, bend and install all reinforcing steel; and to strip and clean all

concrete forms, remove nails from same and pile same in neat piles, all in accordance with the plans and specifications as set forth in said Specification No. 1068, Roza Division, Yakima Project, Washington; that a true, full and complete copy of said sub-contract entered into by said Plaintiffs and the said Defendant, M. C. Schaefer, is hereto attached, marked Exhibit "A," and by reference made a part of this complaint.

V.

That said sub-contract entered into by and between the Plaintiffs and the Defendant as aforesaid, provided that:

"Time being the essence of this Contract the Sub-contractor shall prosecute his work with a diligence and to the utmost of his ability and in a workman-like manner."

Said contract further provides:

"Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

"Coordinate the work covered by this agreement with that of all other sub-contractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other sub-contractors to facilitate the completion of

the entire work. The sub-contractor shall be governed by such orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The sub-contractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all contractors, sub-contractors and material men. If the subcontractors shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the sub-contractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work.

VI.

That thereafter, on or about the 30th day of November, 1944, the Plaintiffs directed the Defendant to commence performance of the work called for under said sub-contract, such order having been given by letter, a full, true and correct copy of

which is hereunto attached, marked Exhibit "B" and by this reference made a part of this complaint.

VII.

That the Defendant failed, neglected and refused to commence performance of said work provided for by said sub-contract when directed to do so by the Plaintiffs and failed to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of the Plaintiffs as principal contractor as required by the terms and provisions of said sub-contract, and continued to fail, neglect and refuse to perform said work or any part thereof.

VIII.

That on the continuing failure of the Defendant, M. C. Schaefer, to carry on the performance of his said sub-contract and to coordinate the work provided for thereunder with the work of the other sub-contractors and of the principal contractor, the Plaintiffs, on the third day of January, 1945, notified the Defendant in writing that he was in default and that the Plaintiffs would take over and perform at Defendant's cost the work described in the said sub-contract; a full, true and complete copy of said notice marked Exhibit "C" is attached hereto and by this reference made a part hereof.

IX.

X.

That thereafter the Plaintiffs herein did take over and now have fully performed the work provided by the sub-contract between the Plaintiffs and the Defendant; and likewise the Plaintiffs have now fully and completely performed the principal contract No. 12r-14996.

XI.

That the Plaintiffs have fully kept and performed all the terms and conditions of their said sub-contract with the defendant on their part to be kept and performed.

XII.

That by reason of the failure of the Defendant to perform the work agreed to and provided for by the terms and conditions of said sub-contract and by reason of his failure to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of Plaintiff as principal contractor; and by reason of his default under said sub-contract and his breach thereof, the Plaintiffs herein suffered damages in the amount of \$40,000.00.

XIII.

That there is owing by the Plaintiffs to the Defendant an amount not in excess of \$1,499.87 by reason of defendant's performance of a sub-contract entered into by and between the Plaintiffs and the Defendant in connection with the performance by the Plaintiffs as principal contractor of certain

work under Contract No. 12r-14625, Specifications No. 1062, Roza Division, Yakima project, Washington; and Plaintiffs are now willing that all amounts which Defendant is entitled under said sub-contract may be deducted from any amount to which Plaintiffs may be entitled under the allegations of Plaintiff's complaint herein.

Wherefore, Plaintiffs pray for judgment against the Defendant M. C. Schaefer for the sum of \$40,000.00, together with interest thereon at the rate of 6% per annum from the 3rd day of January, 1945, and for their costs and disbursements herein.

TOM W. HOLMAN,
MAGUIRE, SHIELDS &
MORRISON,
Attorneys for Plaintiffs.

(29) 12-20-1945: Despite the filing of said malicious suit in Multnomah County, Oregon, Plaintiff was able to and did file his suit in the Federal District Court in Yakima, Washington, on or about the 20th day of December, 1945. This suit was filed under the Miller Act and was in Quantum Meruit after checking the information contained in a letter received from the Bureau of Reclamation office setting forth the procedure to be followed in connection with claims against contractors holding bonded government contracts. The following is information contained in said letter from the Bureau of Reclamation dated August 10, 1945, to wit:

“This will supply the information requested in

your call to this office on August 8 concerning the procedure to be followed in connection with claims against contractors holding bonded government contracts.

“Accounts for services or materials that are definitely related to this contract are fully protected by a payment bond which the Government contractors are required to execute. The Government does not participate directly in the settlement of such accounts, but the provision of the bond become available in the event that a suit becomes necessary.

“The procedure in cases of this kind is as follows:

“ ‘Under the Act of August 24, 1935, relating to payment bonds, a sub-contractor or material man may file suit after the expiration of 90 days from the day the last labor was done or material furnished, and within one year from the date of final settlement. A person who has no direct contractual relationship with the contractor must notify said contractor of his claim within the 90-day period by registered mail. For a complete description of details and procedure, you are referred to the act which is printed in 49 Stat. 793, 40 U.S.C.A., 270 (a), etc.’

“The Macri Company was bonded by the Continental Casualty Company, P. O. Box # 586, Yakima, Washington. It is suggested that the bonding company as well as the Macri Company, be notified of the account by registered mail.”

(30) Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order from the trial judge dismissing said suit on condition Plaintiff herein file a suit against the Macris on job specification #1068 in Seattle, Washington, which Plaintiff did and the trial court in addition also advised the said Defendants herein to file counter-claim in Plaintiff's suit in Yakima, Washington.

(31) 1-17-1946: After filing of Plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by Defendants Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:

When Continental Casualty Company then saw that Plaintiff's suit was not filed in damages as they had anticipated Plaintiff would file (if Plaintiff had filed in damages Continental Casualty Company could not have been held liable), but instead suit was filed in Quantum Meruit, and then Continental Casualty Company became concerned and anxious to have some solvent defendants added to the case. They then, for the first time, brought to Plaintiff's attention the fact that there should also be named as additional parties Defendant in Plaintiff's said suit a partnership composed of Clyde Philp and A. J. Goerig. Continental Casualty Company also secretly gave the following information to Plaintiff's attorney, said information contained

in a letter dated January 17, 1946, received from Harry L. Olson, Plaintiff's attorney in the Yakima suit, follows, to wit:

"As yet there has been no appearance by any of the Defendants in either of the cases here but I have just secured some information which will probably make it desirable for us to file an amended complaint. I have learned that a Mr. Clyde Philp and Mr. A. J. Goerig of Seattle had entered into a joint venture agreement with the Macris under which agreement they were to share in the profits and losses of this transaction, and my information is that both of these gentlemen are very much financially solvent while the financial position of the Macris may or may not be so good. I would like to hear from you as to whether or not Mr. Schaefer had any knowledge or information as to the connection of Mr. Philip and Mr. Goerig with this transaction or whether they were entirely silent partners as far as he was concerned. My information is also that the joint venture agreement was entered into in December of 1943, and that in July of 1944 another agreement was entered into under which the joint venture agreement was attempted to be terminated.

"* * * Confidentially and for your information, the source of my information as to the joint venture is from the bonding company in this case, which, of course, is anxious to have some solvent defendants added to the case, but I have assured

them that neither of us would reveal to the Macris or to Mr. Philip or Mr. Goerig the source of our information. * * *''

See copy of Agreement Terminating Joint Venture hereinabove under date of 7-15-1944.

Plaintiff also discovered for the first time during the course of the trial of said suit in Yakima, Washington, that Defendant Clyde Philp not only was a silent partner in the joint venture with Defendants Macris and Goerig, but also had signed as attorney-in-fact for Continental Casualty Company the bonds posted by Defendants Macris.

See copy of bonds hereinabove under date of 12-7-1943.

(32) 1-24-1946: Plaintiff's amended complaint in the Yakima cases was filed.

(33) 9-27-1946: Deposition on oral examination of M. C. Schaefer and Sam Macri was taken at Mr. Holman's office in Seattle, Washington.

(34) 1-7-1947: Order on Pre-trial came on for hearing on this date, and the last paragraph of said hearing on page 78 of the Transcript of record states as follows: "It is ordered and adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above-entitled cause, and that the trial of said cause be set for February 20, 1947, at 10:00 a.m." After 1-7-1947 and before February 20, 1947, Plaintiff was informed by his attorney, Mr. Olson, that the above

trial date of February 20, 1947, was set ahead and that said trial was set for February 24, 1947.

(35) 2-21-1947: Willard E. Skeel of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, represented Continental Casualty Company in said law suit in Yakima, Washington, copy of the hearing on this date as recorded in the Transcript of record on pages 2239 to 2252, both inclusive, copy of said record follows:

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-partners Doing Business as MACRI
COMPANY, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on

for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; The Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant, Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: (2485)

* * *

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evi-

dence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. (2486)

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

(Testimony of A. J. Goerig.)

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying (2487) is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his (2488) own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; Suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

(Testimony of A. J. Goerig.)

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? (2489) A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I (2490) don't believe would be a defense here, the action

(Testimony of A. J. Goerig.)

in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the (2491) best evidence; it is not competent evidence.

The Court: I will admit it for the limited pur-

(Testimony of A. J. Goerig.)

pose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore (2492) it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

(Testimony of A. J. Goerig.)

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with these jobs?

A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. (2493)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with these jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

(Testimony of A. J. Goerig.)

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where (2494) did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge,

(Testimony of A. J. Goerig.)

or you do toward notifying any of the material men, laborers, or otherwise on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the material men or the plaintiffs in this case ever knew (2495) about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company? Obligation for the performance of those jobs, to be——

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

(Testimony of A. J. Goerig.)

The Court: I'm not sure that I got the question. Read it. (2496)

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely, that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the (2497) objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because

he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

* * *

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp?

I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of

Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

Plaintiff had no knowledge of said suit coming on for trial on the 21st day of February, 1947, and was not present or represented by his attorney on this date and, in fact, did not know of these facts until on or about the 19th day of August, 1950.

(36) 3-21-1947: This is the date on which the Court rendered its Opinion in the trial had upon the merits of Plaintiff's complaint, and of Defendants' answer and cross-complaint in Plaintiff's suit in Yakima, Washington, which ultimately resulted in judgment in the trial court in favor of Plaintiff and

against the Defendants of Plaintiff's suit for Quantum Meruit, and also in a judgment against Defendants and in favor of Plaintiff in the sum of One Dollar as to Defendant's cross-complaint in which said Defendant alleged damages of \$40,000.00. Copy of Court's Opinion follows:

Yakima, Washington, Friday, March 21, 1947,
9:00 o'clock a.m.

(Whereupon, all counsel presented their final arguments to the Court.)

COURT'S OPINION

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on subcontract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain materials that were listed in the subcontract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any subcontracting of a part of this work.

They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from (2451) the base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the subcontractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the subcontractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope

of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be (2452) reasonable. The Reclamation Bureau, with its long experience in construction of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macri's hoe-type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and

that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in (2453) the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer bank the shiplap, which I assume would be approximately an inch thick, less whatever is planed down, the two-by-fours forming the framework, and then what's been referred to, I think, as the strong-backs, an additional two-by-four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called shebolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the subcontractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and specifications, that it was defectively and improperly done, and that in most instances the carpenters

had to do the fine grading before they could install the forms, and that that also increased (2454) the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so as to enable the subcontractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the subcontract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two-by-fours or the shiplap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and

took the invoices at the direction of somebody (2455) else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job, and Mr. Macri (2546) had notice of these complaints. He had notice and knowledge of his failure

and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all his costs. I think such a finding would be inconsistent with the other testimony in the case here, and (2457) with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the

testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, (2458) 65 F. Supp., page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these

cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in *Susi vs. Zara*, that where the contract is breached by the main contractor, the subcontractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The *Susi* case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never (2459) completed by the subcontractor, and the question was not decided as to whether the subcontractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price

provided in the subcontract. In the Susi case, the main contractor took over the contract when it was partly performed, and made it impossible for the subcontractor to complete it, and the court held that the subcontractor could recover for the reasonable value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the subcontractor is entitled to recover on that basis against the bonding company also. (2460)

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what

the Supreme Court of the State of Washington I think has indicated as its view in cases of this character. In McDonald vs. Supple there was a government contract to construct dredges by the subcontractor, parts and materials to be furnished by the main contractor. The subcontractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount (2461) and value of the work to be done by the subcontractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner; they were defective; the subcontractor had to have a large crew of skilled workmen standing by; they

couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

“The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant.”

And again on page 318:

“The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same

to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover on quantum meruit."

(Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

"Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through."

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say, too, of course, that the bonding company was

not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work, that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.

Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the subcontract to their benefit, where the reasonable value of the work and services under the (2464) circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's Exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to

recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the view of the court is he's not entitled to interest prior to the date of judgment. \$57,618.87, and from that I think should be deducted the legal expense of \$533.57, and the engineering expense of \$201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established (2465) business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow \$57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be

paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances, that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of (2466) whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in

which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from Corpus Juris, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the business, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior

to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Macri with the government on 1062, and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then (2468) was to just ascertain the extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the

partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied (2469) contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think

that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment (2470) against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were dis-

cussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement (2471) as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the circumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty-seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never (2472) been any

excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evidence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. (2473)

(Argument by Mr. Olson.)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as final and controlling importance. I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, give rise to a situation where Mr. Schaefer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll go over these, and I don't want (2474) to rehash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. (2475)

5-1-1947: Date judgment was filed. Copy of judgment follows:

Volume I—Pages 112-115. Transcript of Record

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. Schaefer, an Individual Doing
Business as Concrete Construction Company,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-Partners Doing Business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause having come on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled Court, on the 24th day of February, 1947, the use Plaintiff, M. C. Schaefer, an individual, doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the Defendants Sam Macri, Don Macri and Joe Macri appearing by Sam Macri, and each of said Defendants Macri appearing by and being represented by their attorney, Tom W. Holman of Brethorst, Holman,

Fowler and Dewar, and the Defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney Kenneth Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company, appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and written briefs filed in the matter, and the (82) Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners, doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of \$921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants

A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of \$1,750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of \$none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals, doing business as Macri Company, for the sum of \$1.00 damages as to Specifications 1068 which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri, against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States of America under its certificate of levy, copy of

which was received in evidence as Macris' Exhibit 67. (83)

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of Sam Macri, Joe Macri and Don Macri against the Defendants A. J. Goerig and Clyde Philp be and the same is hereby dismissed without costs.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. (84)

(37) 5-9-1947: Motion for New Trial was filed in the Court at Yakima, Washington, by Continental Casualty Company. Copy of said Motion as recorded on pages 115 and 116 of Transcript of Record in said suit follows:

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-

entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:

1.

That judgment was not sustained by substantial evidence.

2.

That judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of \$2,656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of \$2,656.46. (85)

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,

Attorney for Defendant,

Continental Casualty Co.

[Endorsed]: Filed May 9, 1947. (86)

(38) 5-20-1947: Order denying motion for new trial filed in the Court at Yakima, Washington, copy of said order as recorded on page 117 of Transcript of Record in said suit follows:

ORDER DENYING MOTIONS FOR
NEW TRIAL

The above-entitled cause having come on regularly for argument on the 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above-entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in open court this 20th day of May, 1947.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. (87)

Plaintiff herein can not find any reference whatever in the Transcript of Record in the above-mentioned cause wherein the Defendants A. J. Goerig and Clyde Philp or the Macris had filed a motion for a new trial.

(39) 5-20-1947: Date Continental Casualty Company filed Notice of Appeal. (Transcript, 118.)

(40) 7-29-1947: Date A. J. Goerig & Clyde Philp filed Notice of Appeal. (Transcript, 129.)

(41) 8-18-1947: Date Sam, Don and Joe Macri filed Notice of Appeal. (Transcript, 136.)

(42) 5-26-1947: Date Continental Casualty Company filed Supersedeas appeal bond in the sum of \$65,000.00. (Transcript, 119.)

(43) Plaintiff herein filed a motion to dismiss appeal of Cross-Appellants Macri, a copy of said motion follows:

In the United States Circuit Court of Appeals
for the Ninth District
No. 11707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual Do-
ing Business as CONCRETE CONSTRU-
TION COMPANY,

Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

MOTION TO DISMISS APPEAL OF
CROSS-APPELLANTS MACRI

Comes now the Appellee, M. C. Schaefer, an individual, doing business as Concrete Construction Company, and moves the above-entitled Court for the following order:

1.

That an order be entered, dismissing the appeal of the Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; this motion to dismiss is made upon the grounds and for the reason that said Defendants and Cross-Appellants failed to serve and file their notice of appeal timely, as required by 18 U.S.C.A., Section 230, and is based upon the transcript of the record, heretofore filed in this Court, and upon the affidavit of Harry L. Olson, hereto attached and made a part of this motion.

2.

The facts, objects and points, concerning this motion to dismiss, are as follows: That upon the 1st day of May, 1947, Findings of Fact, Conclusions

of Law and Judgment were entered in said case, and no motion for a new trial was ever made, for or on behalf of the said Defendants and Cross-Appellants Macri; that on the 9th day of May, 1947, Defendant and Appellant, Continental Casualty Company, interposed a motion for a new trial; that on the 12th day of May, 1947, Defendant and Cross-Appellants, A. J. Goerig and Clyde Philp, interposed a motion for a new trial; that thereafter, on the 20th day of May, 1947, an order denying both of the above motions for a new trial was entered by the District Court; that upon the 16th day of August, 1947, the Defendants and Cross-Appellants Macri served and filed their notice of appeal to the above-entitled Court. That said notice of appeal was served and filed 110 days after the entry of said Judgment, and that Appellants Macri, not having interposed a motion for a new trial, it is the position of the Appellee herein, that the time for appeal, as for the Cross-Appellants Macri, began to run upon the entry of the Judgment, and was not suspended by the motions for a new trial, interposed by the other Defendants herein.

3.

An authority for the position of the Appellee that the notice of appeal of the Cross-Appellants Macri was not timely, Appellee cites the following authorities: *Denholm and McKay Company vs. Collector of Internal Revenue*, 132 Fed. (2D) 243; *Alexander vs. Special School District of Boonville*, 132 Fed. (2D) 355; *Tinkoff vs. West Publishing*

Company, 138 Fed. (2D) 607; Bowles vs. Rice, 152 Fed. (2D) 543; Morrow vs. Wood, 126 Fed. (2D) 1021; Safeway Stores, Inc., vs. Coe, 136 Fed (2D) 771; 26 U.S.C.A. 230.

Dated this day of December, 1947.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Appellee,
M. C. Schaefer.

AFFIDAVIT OF HARRY L. OLSON

State of Washington,
County of Yakima—ss.

Harry L. Olson, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for Appellee, M. C. Schaefer, doing business as Concrete Construction Company, and makes this affidavit in support of the motion to dismiss the appeal of Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; that the Judgment, Findings of Fact and Conclusions of Law in the above-entitled case were signed by the Court and entered upon May 1st, 1947; that no motion for a new trial was ever made for or on behalf of the Defendants and Cross-Appellants Macri; that the Continental Casualty Company served and filed a motion for a new trial upon the 9th day of May, 1947; that A. J. Goerig and Clyde Philp served and filed a motion for a new trial on May 12th, 1947; that the District Court signed and

entered an order denying said motions for a new trial, interposed by the Appellants, Continental Casualty Company, and Cross-Appellants, A. J. Goerig and Clyde Philp, on May 20th, 1947; that the Cross-Appellants Macri served and filed their notice of appeal to the Circuit Court of Appeals on August 16th, 1947.

HARRY L. OLSON.

Subscribed and Sworn to before me this day of January, 1948.

.....,

Notary Public for Washington,
Residing at Yakima.

(44) 3-31-1948: Date opinion upon motion to dismiss appeal of Macri, et al., was filed. Copy of said Opinion follows:

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 11,707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-Partners,

Defendants and Cross-Appellants.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

March 31, 1948

Upon Appeals from the District Court of the
United States for the Eastern District of
Washington, Southern Division

Upon motion to dismiss appeal of Macri, et al.

Before: Denman, Healy and Bone,
Circuit Judges.

Denman, Circuit Judge:

The United States, as use plaintiff for one Schaefer, sued Sam Macri, Don Macri, Joe Macri, A. J. Goerig, and Clyde Philp, individuals and co-partners doing business as Macri Company, and Continental Casualty Company, a corporation, upon a claimed non-performance of contract between the United States and Defendants Macri Company for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sublaterals Roza Division, Yakima Project, Washington, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the

terms of said contract for the sum of \$128,550.95. The Continental Casualty Company was joined as surety for the Macri Company's performance of the contract. Judgment on this contract was entered against the three Macris and the Continental Casualty Company jointly and against each of them.

The complaint also alleged non-performance of a subcontract of the Macris' Company on the same job. Judgment was entered against them alone on this count. The complaint against the other two partners was dismissed.

The Continental Casualty Company claimed against the three Macris on their contract to hold it harmless on its surety bond. Judgment was entered against the Macris for the amount the Continental Casualty Company was held liable to the plaintiff and for its attorneys' fees. This judgment was not made conditional on the non-payment of the judgment by the Macris.

The three Macris also cross-complained against the plaintiff. Judgment was entered dismissing the cross-complaint. The three Macris also cross-complained against Goerig and Philp. Judgment was entered dismissing this cross-complaint. Goerig and Philp cross-complained against the three Macris. Judgment was entered dismissing this complaint. All the judgments were entered on May 1, 1947.

The Continental Casualty Company and Goerig and Philp moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philp appealed

within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.

Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of the others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.

As to the judgments against the three Macris on their cross-complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philp was of adversary parties and could not be construed as on behalf of the Macris. So also of the judgment for the United States on the second count against the Macris alone. The statute was not tolled as to it.

The joint and several judgment on the count in favor of the United States and against the Macris and their surety and that in favor of the Continental Casualty Company against the Macris on their agreement to hold it harmless present a different question. It is contended that since there might have been a granting of the motion for a new trial in favor of the Continental Casualty Company, the Macris' surety, which would dispose

of the same issue as that decided against the judgment debtors Macris, co-jointly and with their surety, the pendency of the motions for a new trial by one of such debtors tolled the time for appeal as to all of them.

The Macris cite *Brockett, et al., vs. Brockett*, 2 Howard 238, 240, the leading case of the judge-made law that the pendency of a motion to modify a decree or for a new trial tolls the statutory time for appeal.* However, the opinion there states that the petition to have opened the decree, the consideration of which tolled the statute, was by the losing "defendants" (plural). The title of the case, with *Brockett, et al.*, as appellants, as well shows the petition was not by one of them appealing alone.

More relevant is *Zimmerman vs. United States*, 298 U.S. 167, where the judge sua sponte, extended the time to do all things connected with the decree because "it will be necessary to modify and amend the said decree." There the Supreme Court reasoned that since none of the defendants decreed against could know how the amendment would affect him, the statute was tolled as to all. Cf. *Leishman vs. Associated Electric Co.*, 318 U.S. 203, 205.

It is apparent that if the motion for the new trial were granted to the surety of the Macris, it would be on grounds that in justice would require a similar relief for the Macris against the judg-

*Now embodied in F.R.C.P. 73(a) effective March 19, 1948.

ment on the first count in favor of the United States and also that against them and in favor of the surety. If the trial court on the motion of the surety had the power to set aside these two judgments, the Macris could not know until the surety's motion were decided whether the judgments were final as to them. That is to say, they would be in the situation of the parties in the Zimmerman case.

The question, then, is could the trial court under Rule 59(a) of the Federal Rules of Civil Procedure have granted a new trial to the Macris on their judgment on the motion of their surety. As to judge-tried cases, Rule 59(a) provides:

“(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. * * * (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”

It is not a strained interpretation of the language of the first sentence of the rule that a motion of a surety to “open,” that is, set aside, a joint and several judgment against it and its three principals empowers the court to set it aside as to all four of

them. We have held that those rules must be liberally construed. *Phillips vs. Baker* 121 Fed. (2d) 752, 754; *Pierkowskie vs. New York Life Ins. Co.*, 147 Fed. (2d) 928, 933 (C.C.A. 3); *Fakouri vs. Cadais*, 147 Fed. (2d) 667, 669.

An analogy to such an interpretation of power in the district court is the power of the appellate court on an appeal taken by but one party on an issue which, if resolved in his favor, will likewise affect another party, to reverse the judgment as to such non-appealing party. In *re Barnett*, 124 Fed. 1005, 1009 and state cases cited: *Maryland Casualty Co. vs. City of South Norfolk*, 54 Fed. (2d) 1032, 1039; c.f. *Washington Gas Light Co. vs. Lansden* 172 U.S. 534, 555.

Since it is our view that the motion for a new trial by their surety tolled the statute for the Macris, on their appeals from the judgment on the first count of the complaint of the United States and the judgment in favor of Continental Casualty Company, we hold they conferred jurisdiction here. As to the other appeals of the Macris, we order entered a judgment of dismissal as to them.

[Endorsed]: Opinion upon motion to dismiss appeal of Macri, et al. Filed Mar. 31, 1948. Paul P. O'Brien, Clerk.

(45) 10-19-1948: Date the appeals were argued in the United States Court of Appeals for the Ninth Circuit.

(46) 2-11-1949: Date the United States Court of

Appeals for the Ninth Circuit affirmed the judgment of the said District Court.

(47) 4-5-1949: Date the United States Court of Appeals for the Ninth Circuit denied the petitions for rehearing that had been filed by Continental Casualty Company on March 7, 1949, and the petition of Macri, et al., filed March 10, 1949. Copy of the proceedings had in the United States Court of Appeals for the Ninth Circuit follows:

CONTINENTAL CASUALTY COMPANY, a Corporation,

vs.

M. C. SCHAEFER, etc., et al.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, October 19, 1948.

Before: Denman, Chief Judge, and Healy and Bone,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Elwood Hutcheson, counsel for appellant, Continental Casualty Company, and by Mr. Tom W. Holman, counsel for appellants, Macri, et al., and by Messrs. Stuart W. Hill and Harry L. Olson, counsel for appellee, Schaefer, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February
11, 1949.

Before: Denman, Chief Judge; Bone and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day
rendered by this court in above cause be forthwith
filed by the clerk, and that a judgment be filed and
recorded in the minutes of this court in accordance
with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Appeals from the District Court of the United
States for the Eastern District of Washington
Southern Division

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

Denman, Chief Judge:

OPINION

The several Macris, hereafter so called, contrac-
tors on a government contract under the Miller Act,

appeal from a judgment in favor of Schaefer, their sub-contractor, for labor and materials furnished in the performance of a subcontract and modification thereof.

Continental Casualty Company, hereafter called Continental, appeals from a judgment against it as surety on the contract between the Macris and the United States, described *infra*, in favor of Schaefer for the amount of the judgment against the Macris.

The Macris do not contend that they are not liable for an unpaid balance on the contract price included in the judgment, but contend they are not liable for more than the contract price. They contend that the evidence does not support the court's findings that they breached the subcontract and, on the contrary, that the extra work done by Schaefer was in the performance of that contract. Continental's appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract. Continental also seeks to recover here additional attorney's fees for prosecuting this appeal. The dispute between Schaefer and the Macris arises out of the performance of a subcontract to do the cement work on the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington. Schaefer sued to recover \$57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on a quantum meruit theory after the alleged breach of a contract by the

Macris. The subcontract between Schaefer and the Macris provided that Schaefer was to furnish all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans as specified (in certain numbered specifications).

The trial court, sitting without jury, found that the Macris were to perform all of the excavating and to furnish all of the materials necessary for the performance of the subcontract with the exception of form wire, nails and curing materials. The excavating and materials were to be furnished in accordance with specifications and in proper time for the performance of the subcontract by Schaefer. The court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found willful and negligent and they continued and persisted throughout the entire performance of the subcontract.

The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to con-

tinue performance and to perform some of the work the Macris were to do, and that Schaefer would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that "there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon (Schaefer by the Macris' breaches)."

The subcontract contained a provision that in order to obtain extra compensation, written notices and statements were required. The court found that the Macris had waived this provision by their conduct toward Shaefer by accepting and acting upon the oral notices given.

Judgment was rendered in favor of Schaefer against the Macris and Continental for \$56,764.97, with interest from date of judgment. Also, a judgment in that same amount was rendered in favor of Continental against the Macris, plus \$1750 for Continental's attorneys' fees. Continental and the Macris both appeal from the judgments, and Continental asks for additional attorneys' fees from the Macris to cover the prosecution of this appeal.

A. The law governing the several issues.

On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel

that the reasons underlying the doctrine of *Erie Ry. Co. v. Tomkins*, 304 U. S. 64, are applicable here, where the issue does not involve construction or application of a federal statute. *Blair v. United States*, 147 F. 2d 840, 849 (Cir. 8). Cf. *Goerig v. Continental Casualty Co.*, 167 F. 2d 930 (Cir. 9). The rights and liabilities of the parties under the subcontract should not depend on the choice of forum sought to enforce these rights. Cf. *Guaranty Trust Co. v. York*, 326 U. S. 99, 109. Hence we should decide this issue as would a state court sitting in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable. *Hatcher v. Idaho Gold and Ruby Mining Co.*, 106 Wash. 108, 113, 179 P. 106.

On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal statute, the Miller Act, under which it was created *Liebman v. United States*, 153 F. 2d 350 (Cir. 9).

B. Macris' Liability to Schaefer.

The district court held that there was an "implied agreement or quasi-contract" to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there

is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will not weigh the evidence in such a case. F.R.C.P. Rule 52 (a). We cannot say that this finding is clearly erroneous.

Since the court found that the subcontract was willfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements which were intended to induce reliance. *Olwell v. Nye and Nisson Co.*, 26 Wash. 2d 282. Whether the theory is called implied-in-fact contract, quasi-contract or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit. *Nelson v. City of Seattle*, 180 Wash. 1, 28, 38 P. 2d 1034. Cf. *United States v. Zara Contracting Co.*, 146 F. 2d 606 (Cir. 2); 5 Williston, *Contracts* (Rev. Ed.) §1480.

The Macris contend that Schaefer may not recover for the extra work because he has not complied with the contract provisions regarding written notice of changes in order to get extra compensation. The trial court found that the Macris had waived these provisions by accepting and acting on the oral notices, and there is ample evidence to support such a finding. Such a provision does not

deprive the parties of the power to modify the contract without a writing, *Richie v. State*, 39 Wash. 95, 81 P. 79.

The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468 (Cir. 9). That case is not applicable here because it was a diversity case in which this court expressly applied California law to determine the rights of the parties under the contract. Furthermore, that case is distinguishable in that the nature of the claim, although on the theory of quantum meruit, was really for damages for delay, and the plaintiff there had failed to comply with provisions of the City's charter relating to filing such claims within sixty days. Also, there the alleged extra work done was that which the plaintiff contracted to do, but it had become more burdensome due to unanticipated conditions. The City had held out no added inducement to the contractor to continue performance, and did not, by implication or otherwise, agree to pay the contractor anything beyond the amount fixed in the written agreement. In the instant case, no statute limits the Macris liability for breaches of the subcontract, and also Schaefer has performed work at the Macris' request which was not called for by the subcontract. We hold the Macris liable for the extra work performed at their request.

C. Method of Ascertaining the Amount of Recovery.

Macris contend that Schaefer should not recover because he has failed to prove the increased cost

of the work because of Macris' defaults. Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed.

D. Continental's Liability to Schaefer.

Section 1 of the Miller Act, 40 U.S.C. §270 (a), provides that the contractor with the government shall furnish "a payment bond * * * for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of each such person." Section 2, 40 U.S.C. §270 (b), provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit * * *."

Continental contends that Schaefer's cause of action is for damages for breach of the subcontract by the Macris, and that a surety under the Miller Act is not liable for such damages. *United States v. Maryland Casualty Co.*, 147 F. 2d 423 (Cir. 5); *L. P. Friestedt Co. v. United States Fire Proofing Co.*, 125 F. 2d 1010 (Cir. 10). These cases are distinguishable from the instant case in that there was no agreement there by the general contractor or the United States to pay any additional amount for the extra work done. Here the court below found, "That pursuant to said subcontract * * * and pursuant to the oral conversations, representations and inducements herein referred to, (Schaefer) between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the (Macris) at their special instance and request of the reasonable cost and value of \$89,498.71." From this amount was deducted the amount the Macris paid on account, which left a balance of \$56,764.97, the amount of the judgment. It does not appear from this finding that the amount of the judgment included damages for breach of contract.

In the *Friestedt* case, *supra*, at page 1012, the court said, "There is here no claim that they (the subcontractors) furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract * * * What was done was not required by any of the terms of the contract but became necessary because of an alleged breach of the contract because

a contractor violated one of the terms of the contract; * * *'' Here the new agreement between the Macris and Schaefer contemplated that Schaefer was to perform extra work, which the Macris were originally obligated to perform, in order that the main contract between the Macris and the United States could be performed. The performance of the new agreement furnished labor and materials agreed by the Macris to be supplied under the main contract and hence labor and materials within the terms of the Miller Act and the bond. Cf. *John A. Johnson & Sons v. United States*, 153 F. 2d 534 (Cir. 4). The judgment against Continental is affirmed.

E. Attorneys' fees for Continental's Appeal.

The trial court awarded Continental \$1750 for attorneys' fees in that court. Continental now seeks to recover in this court fees for the prosecution of this appeal, pursuant to a provision in the application for the bond which required the Macris "to indemnify the company (Continental) against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all kind of liability therefor, sustained or incurred by the company * * * in prosecuting or defending any action brought in connection (with the bond.)'' There is also a provision "that separate suits may be brought hereunder as causes of action accrue" without prejudice to other suits regardless of when the cause of action arises.

No cause of action had accrued for the attorneys'

services in this court when the case was pending in the district court. Whatever right the parties may have for this more recent cause of action should be instituted in a court of first instance. It is an original proceeding which cannot be initiated here.

In the three cases cited by Continental: American Can Co. v. Lodoga Canning Co., 44 F. 2d 763 (Cir. 7); Davis v. Parrington, 281 Fed. 10 (Cir. 9) and Rigopoulous v. Kervan, 140 F. 2d 506 (Cir. 2), the statutes involved created in the appellate court the right there to recover attorneys' fees.

The judgment of Schaefer against the Macris and Continental is affirmed. The petition for allowance of attorneys' fees is dismissed, without prejudice.

[Endorsed]: Opinion. Filed Feb. 11, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY

vs.

M. C. SCHAEFER, etc.

A. J. GOERIG and CLYDE PHILP

vs.

CONTINENTAL CASUALTY COMPANY.

SAM MACRI, et al.,

vs.

M. C. SCHAEFER, etc.

JUDGMENT

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Southern Division, and on petition of Continental Casualty Company for allowance of attorneys' fees on the appeal and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be, and hereby is affirmed, and that the petition of Continental Casualty Company for allowance of attorneys' fees on the appeal be, and hereby is denied.

[Endorsed]: Filed and entered Feb. 11, 1949.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 5, 1949.

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

ORDER DENYING PETITIONS
FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appel-

lant, Continental Casualty Co., filed March 7, 1949, and the petition of appellants, Macri, et al., filed March 10, 1949, both within time allowed therefor by rule of court, for a rehearing of above cause be, and each of them hereby is denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF
APPEALS FOR THE NINTH CIRCUIT,
TO RECORD CERTIFIED UNDER RULE
38 OF THE REVISED RULES OF THE
SUPREME COURT OF THE UNITED
STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six volumes, containing two thousand two hundred and seventy-five (2,275) pages, numbered from and including 1 to and including 2,275, to be a full, true and correct copy of the entire record together with original documentary exhibits transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, Continental Casualty Co., and the appellants, Macri, et al., and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United

States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of April, 1949.

[Seal] PAUL P. O'BRIEN,
Clerk.

(48) 4-5-1949: Date of the Order Staying Issuance of Mandate was endorsed and filed in the United States Circuit Court of Appeals for the Ninth Circuit. Copy of same follows.

United States Circuit Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY,
Appellant,
vs.

M. C. SCHAEFER, etc.,
Appellee.

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Elwood Hutcheson, Esq., counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed, pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the

Supreme Court of the United States on or before May 16, 1949. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN,
United States Circuit Judge.

Dated San Francisco, Calif., April 5, 1949.

[Endorsed]: Filed April 5, 1949. Paul P. O'Brien, Clerk.

(49) 5-14-1949: Continental Casualty Company filed their petition for writ of certiorari in the Supreme Court of the United States.

(50) 6-20-1949: Continental Casualty Company's petition for writ of certiorari denied.

(51) 6-20-1949: Macris filed petition for writ of certiorari in the Supreme Court of the United States.

(52) Continental Casualty Company filed their petition for rehearing on the order denying their petition for certiorari.

(53) 10-10-1949: Continental Casualty Company's petition for rehearing on the order denying their petition for certiorari was denied.

(54) 10-10-1949: Macri's petition for writ of certiorari denied.

(55) 11-4-1949: Plaintiff accepted Continental Casualty Company's draft in payment of the judg-

ment on job specification No. 1062, but only after two hours and ten minutes of argument before the attorneys for the Continental Casualty Company deleted three words on the back of said draft. The following is a copy of the statement on the back of said draft as first presented to plaintiff and the three words shown underscored are the words x'd out before said draft was accepted by plaintiff: "Received of Continental Casualty Company the sum of \$66,306.48 in full payment and satisfaction of judgment, interest, costs, etc., in cause entitled United States of America for the use of M. C. Schaefer, an individual, doing business as Concrete Construction Company, vs. Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri Company, and Continental Casualty Company, a corporation, being Civil Case No. 246, United States District Court for the Eastern District of Washington, Southern Division." The above three underlined words were used in furtherance of defendants' concerted plan and would have deprived plaintiff of his rights to maintain this suit.

(56) 11-9-1949: Date the draft issued by Continental Casualty Company was finally paid.

(57) 1-6-1950: Phone conversation had by Stewart W. Hill and plaintiff at plaintiff's office with Harry L. Olson at Olson's office in Yakima, Washington, in regard to getting damage suit ready to file.

(58) 1-7-1950: On this date plaintiff and his

Portland attorney, Stewart W. Hill, checked many of the details of this suit and Mr. Hill agreed to have a tentative draft of the complaint with sustaining points of law ready by the time plaintiff returned from his vacation on or about the 15th day of March, 1950. At that time plaintiff and his attorney, Harry L. Olson, and Mr. Hill would meet and prepare the final draft of the complaint to be filed.

(59) 8-8-1950: Olson's letter to Brethorst, Holman, Fowler & Dewar. Copy of said letter follows:

August 8, 1950.

Brethorst, Holman, Fowler & Dewar,
Attorneys at Law,
17th Floor, Hoge Building,
Seattle 4, Washington.

Gentlemen:

Attention: A. T. Bateman.

Re: Schaefer v. Macri, et al.

I have your letter of August third enclosing original and copy of proposed order in connection with the Macri's cost bond and I am unable to approve the same for two reasons:

First: I at one time examined the bonds filed in connection with the appeal and I recall that at least one of the bonds was conditioned upon payment of any damages caused by any delay resulting from the appeal. Mr. Schaefer asserts that these damages are substantial and contemplated instituting suit for the same.

In the second place, when the Continental Casualty Company paid the judgment in connection with this case they took an assignment of the judgment to them and when I called Mr. Hutcheson, who represents the Bonding Company, he was also opposed to my approving the order.

Yours truly,

HARRY L. OLSON.

HLO:re

(60) Even after conclusion of said litigation and payment to Plaintiff, Defendant McKelvy still attempted to deprive Plaintiff of his right to be heard on Plaintiffs allegation of damages from conspiracy by trying to get Plaintiff to pay for alleged "services" rendered by McKelvy between 11-1-1944, and 10-20-1945, and thus bar such action. Thus, on 8-16-1950, McKelvy came to Plaintiff's office in Portland, Oregon, and the following is a copy of the memorandum of the conversation on that date:

Conversation with Mr. McKelvy August 16, 1950
From 1:30 to Approx. 2:35 P.M.

After saying hello to one another, he asked: "How is business?" I said: "Nothing to brag about." He said: "I thought it would be good." I said: "No, you see, we are still in the concrete subcontracting game instead of doing general contract work because of the lack of money due to the heavy expense of the suit, and aside of that, we are not able to make bond on any work." Mr. McKelvy said: "This statement came up and I told the girl

at the office that I would take it along and see what I could do with it." I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run-around. He then said: "Well, I don't see where that affects this account. Now if it is too much, why you set the amount and let's get it cleaned up. In any event we will not sue you as the statute of limitations has run on it." I then said: "As far as an account being outlawed by time doesn't make any difference to me. If an account is just, I will pay it anyway, regardless of the time." He said: "Well, I would, too, and on this I think we earned it. Apparently you don't think so." I said: "Well, I want to see what the score really is. I've gotten the run-around for a long time and I would like to find out why I was led right up to the brink where I only had about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—'We can't represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.' I then asked you how much time I yet had before the deadline, and you said—'About a month.' " Mr. McKelvy then said: "We did not know before that time that Continental Casualty Company would be involved in a suit or we would not have taken your account. If it were the money we were after and thought Continental Casualty Company would become involved,

we would not have taken your case in the first place. As it was, they asked us to represent them, but we turned them down." I then said: "Now, that would have been nice if you would have agreed to represent them after having represented me, wouldn't it?" McKelvy then said: "I don't like your implying that we are crooked. We have been in business and had a good reputation since before the turn of the century." I said: "I didn't make that statement. I am just relating what has happened that I don't like. Now, wouldn't it have been much better if you had informed me the first time that I was in your office that you couldn't represent me as Continental Casualty Company was one of your largest accounts instead of leading me right up to the brink where, if I had not been on my toes, I would have lost my right to sue." McKelvy said: "Yes, but our hindsight is now much better than our foresight and we did not believe that Continental Casualty Company would be involved." I said: "Nevertheless, they were Macri's Bonding Company and you knew it." And then I also said: "Then you remember the time you told me as you and I were walking up the street that I couldn't collect from Macri as he had all his assets hidden, that the chances of holding Continental were very slim, and told me to turn my business and anything of value over to brother Bill, a brother-in-law or someone I could trust and thereby get rid of the account with Uncle Sam and all other old accounts. And how you handled an account for a local contractor and the Bank in

that case lost approximately \$83,000.00 and you got their release on it and that the contractor is still doing business. I told you then that my road was a straight road, probably long and rough as hell, and that's the only road I'm traveling and if it busts me up that is still the way it's going to be done. You remember that, do you?" Mr. McKelvy said: "Yes, I do." I said: "And how when you showed me young Macri's picture and told me that—'This is just a coverup of Macri's assets. Everyone knows the kid didn't do it, but he has had his day in court and that's a closed book.' You remember that, don't you?" Mr. McKelvy said: "Yes, I do." I said: "Then after they had Macri's assets hidden, they came up with a termination agreement to protect Philp & Goerig, and that damn thing is predated ahead of our pouring concrete or dated the middle of July. Now isn't that something?" McKelvy said: "I think you may have that about right." I said: "I just want to find out if a bonding company can do this on two different jobs. First, on a job where the General Contractor goes broke before the job is completed, the bonding company takes over, submits statements to the school board, as an example, receives payment on same, receives statements from subcontractors and material companies and pays them. In this way they are filling the shoes of the General Contractor where the public is concerned or the public officials are concerned or they would soon be out of business. But take the second job where the general contractor completes the job there is no general

public concerned and they just tell the subcontractors and material men to go to hell or in effect just as much. Then we have to spend \$40,000.00 to \$50,000.00 to collect \$57,000.00 plus interest from date of judgment. I am getting suit ready now.” McKelvy said: “That will take another 10 to 15 years.” I said: “I don’t care. I’ll still have six years left. I owe it to my conscience, my men, and to other sub-contractors to clear such a situation up.” Then I said: “And what about the meeting that I had with you at your office at about 11:30 a.m. and we only greeted one another and had a few words but did not get into our subject, when you told me that you had a luncheon speaking engagement and would meet me back at your office at 1:15 p.m. This was the arrangement when we walked out of your office. I was back to your office a little before one. The outer office girl asked if I were waiting for you. I said ‘Yes.’ and she said, ‘Mr. McKelvy isn’t going to be in any more today.’ I said, ‘Yes, he is to be back at 1:15—that was our arrangement just before lunch.’ ‘I will wait.’ Then approximately at 1:20 she said: ‘I really don’t think he will be back as he is going out to his new home.’ I asked what the telephone number was; and she said, ‘I don’t know, he has no telephone out there yet.’ I asked what the address was; and she said, ‘I don’t know.’ I asked if there wasn’t someone in the office that did; and she said, ‘I am sure there isn’t.’ I waited until about 3:30 then came home. It was about that time that I was really putting on the pressure to get the suit started.” Mr. McKelvy said:

“I don’t remember that I ever had such an appointment with you and let you sit. I don’t deny it, but we just don’t do business like that.” I said: “At that first meeting in your office after I told you of my gripe, you had Mr. Skeel in and told him the story. Mr. Skeel said, ‘Well, you can’t hold the Casualty Company—and only Macri, if you have absolute segregated costs as this is in the contract and that is not.’” Now, I said: “That’s impossible in a situation like this. Now why didn’t you or Mr. Skeel inform me at that time that Continental Casualty was an account of yours?” Mr. McKelvy said: “Well, we didn’t think they would be involved.” I said: “No, you thought that we would sue as many others did in the past and let it be called damages and we would lose our case.” Mr. McKelvy said: “Well, I advised you to get Olson and he did you a good job, didn’t he?” I said: “Yes, you gave us the name of about four attorneys and we selected Olson and that was on my question of a good attorney in Yakima.” McKelvy said: “I spent some time on the phone with Mr. Olson. I called Mr. Olson twice and I also have some copies of letters in my files that I wrote to Olson telling him to watch out so that it would not be called damages.” I said: “You Did!!—You ask Olson who told him at the first and second meetings not to use the word damage, that we were suing for cost, and I told him at the third meeting after he used the word that if he were going to use it again it meant only one thing to me, that I would have to get another attorney. That he shouldn’t even think the word in connection with this suit. A suit in dam-

ages may come later, this has to be in Quantum Meruit." Mr. McKelvy said: "Well, I would like to get this account off the books, so I'll leave it up to you. You pay me what you want to and we'll call the account paid. I just want something so we can close our books." I said: "I'm not doing anything about it." Mr. McKelvy said: "Well, if that's it, we'll just have to write it off and forget about it then." (He then left our office.)

(61) 8-18-1950: P. L. Darcy and plaintiff drove to Olson's office at Yakima, Washington, and checked with Mr. Olson and went through Olson's files to see if there were any such letters as McKelvy claimed he has sent to Mr. Olson and found that there were none in the files and Mr. Olson denied that he ever had such a phone call or other conversation as Mr. McKelvy had claimed he had with Olson. See 8-16-1950 hereinabove. And as to the claim made by Mr. McKelvy on 8-16-1950, "We have been in business and had a good reputation since before the turn of the century." This statement does not quite click when compared with an article in the Oregon Journal of 7-25-1948 under the caption "Skeel Selected by Trade Group." A part of the said article reads: "Senior Partner of the legal firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, he is also a director of several leading financial, industrial and shipping concerns. He has served on the committee for economic development, highway and traffic study groups, the Community Chest, Rotary International and other organizations.

“He came to Seattle 40 years ago and in 1917 founded the legal firm which he now heads.

“The next trade conference is to be held in Portland, November 15 and 16, with the Portland Chamber of Commerce as host.”

There is also an item in the Oregon Journal of July 27, 1948, which shows a picture of Tom W. Holman and below it reads:

“Tom W. Holman, Seattle attorney and head of Washington Highway department advisory committee, is president of Western Association of State Highway Officials which is holding a three-day convention here.”

(62) 10-4-1950: Plaintiff called Mr. Harry L. Olson at his home in Yakima, Washington, at approximately 7:30 p.m. Plaintiff asked Mr. Olson what day would be convenient for him to meet with plaintiff and plaintiff's Portland attorney to check over with him the rough draft of a complaint so they could put the finishing touches on it and get the damage suit filed. Mr. Olson said, “Most any time, Matt, as long as you let me know a couple of days ahead of time so I won't be in Court when you get here, and so I can arrange to give the necessary time to the conference. When do you and Hill want to be up?” Plaintiff said, “It will be another attorney because Hill has not accomplished anything worth while. I don't think Hill likes to handle a suit in conspiracy, and also because of the parties named.” Olson asked who Plaintiff was naming. Plaintiff named all the defendants herein,

and Olson then said, "Matt, if you are naming McKelvy, I can't go along with you on it. Why don't you let him out of it? He's only the agent of Continental Casualty Company." Plaintiff said, "Why should I? He is the worst offender." Mr. Olson said, "Well, you can always subpoena him." Plaintiff said, "No, I wouldn't do a thing like that; even tho he's only the agent, he's still one of the wrongdoers." Olson then said, "Well, Matt, I'm sorry, but McKelvy recommended me to you." Plaintiff said, "No, he recommended four attorneys, and you were the third attorney he named, so you shouldn't count it that way." Olson said, "Even so, I just can't go along with you if you're naming another attorney, though I will say I think you have a good case against the bonding company." Plaintiff said, "O.K. then, Harry, I'll just have to get someone else then, I guess."

IV.

That as the sole and proximate result of the aforesaid intentional, concerted conspiracy of Defendants to injure, damage and defraud the Plaintiff, Plaintiff has suffered damages to his credit, to his business and has suffered serious monetary damage in the preparation and conduct of the aforesaid litigation in the sum of \$1,000,000.00.

Wherefore, Plaintiff prays that he have judgment against Defendants, and each of them in the sum of \$1,000,000.00.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed Feb. 9, 1951.

[Title of District Court and Cause.]

DEMAND OF PLAINTIFF
FOR JURY TRIAL

Comes now the Plaintiff, and demands a trial by jury of all the issues involved in this cause said issues being more particularly disclosed by the amended complaint on file herein.

Dated February 9th, 1951.

/s/ M. C. SCHAEFER,
Plaintiff.

Return on Service of Writ attached.

[Endorsed]: Filed Feb. 9, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. The amended complaint fails to state a claim against this defendant upon which relief can be granted.
2. The cause, if any, is barred by the Statute of Limitations. That more than two years has expired since the commencement of any cause of action against this defendant.

3. The complaint is verbose, redundant, prolix and a violation of Rule 8 (a), 10 (b), 12 (f) of the Federal Rules of Civil Procedure applicable to the district courts of the United States. 28 U.S.C.A. following Section 723c.

4. There is a misjoinder of parties defendant.

5. The allegations of the complaint are inconsistent.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

ALTERNATE MOTION TO STRIKE

In case defendant, W. R. McKelvy's motion to dismiss is denied this defendant, defendant moves the court to strike from the amended complaint the following:

1. That portion of the amended complaint on Page 36, Lines 13 to 17, inclusive, and Lines 29 to 32, inclusive, together with all of Pages 37 to 44, inclusive, and Lines 1 to 4, inclusive, on Page 45

on the ground and for the reason that same is inconsistent with the allegations of the amended complaint found on Pages 63, 66, 74, 84 and 86 wherein the complaint on its face shows that the only attorneys of record for Continental Casualty Company in the case referred to wherein this plaintiff sought recovery from Continental Casualty Company and others in the District Court of the United States for the Eastern District of Washington, Southern Division, Cause No. 246, are Eugene D. Ivy and Elwood Hutcheson. Further, the excerpt of the proceedings set forth in plaintiff's amended complaint on Pages 36 and following are part of the record in a cause in which plaintiff herein was not a party, to wit, the consolidated trial of five causes of action instituted in the District Court, Eastern District of Washington, Southern Division, and being numbered causes 250, 251, 255, 257 and 267. See transcript of record on appeal to the Ninth Circuit in said causes being Nos. 11722, 11723, 11724, 11725 and 11726, Pages 19 to 39, and which was apparently received by stipulation in the suit referred to by plaintiff. See transcript of record in the Supreme Court of the United States in the cause entitled "Continental Casualty Company, a corporation, petitioners, vs. M. C. Schaefer, an individual, etc." Pages 2239 to 2251 and the pre-trial order in said cause set forth in Vol. 1 of the aforementioned record, Page 76, and the appearances recorded in said cause on Page 151 of Vol. 1 of said record showing that Eugene D. Ivy was the attorney of record for defendant, Continental Casu-

alty Company, during the trial of said cause. The amended complaint and the proceedings mentioned definitely establish that neither Willard E. Skeel nor any member of the firm, Skeel, McKelvy, Henke, Evenson & Uhlmann, appeared or participated in the aforementioned cause #246 instituted by M. C. Schaefer against Continental Casualty Company.

2. Line 12, Page 28, including the words "through its agents Philp & McKelvy and Defendants Philp & McKelvy," for the reason that the allegations throughout the complaint are inconsistent with the statement that defendant, McKelvy, was in any way involved in the litigation in Oregon therein referred to and the summons and amended complaint set forth on Pages 29 and following show the suit was instituted by the Macris only.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS OR, IN THE
ALTERNATIVE, MOTION TO STRIKE

The defendant Continental Casualty Company, a corporation, moves the Court to dismiss the action against Continental Casualty Company, a corporation, for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

(3) The Complaint is in violation of Rules 8 (a), 10 (b) and 12 (f) of Federal Rules of Civil Procedure.

And in the alternative, but without waiving the foregoing Motion to Dismiss, and specifically insisting upon the same, this Defendant moves the Court to strike the action on the ground that the Complaint is verbose and redundant.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Notice of Motion

To M. C. Schaefer, Plaintiff:

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle,

Washington, on the day of, 1951,
at 10:00 o'clock in the forenoon of that day, or as
soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

STATEMENT OF REASONS IN SUPPORT OF MOTION AND LIST OF CITATIONS

A Motion to Dismiss a Complaint should be sustained where averments of the Complaint show that the plaintiff cannot state a cause of action upon which he can recover.

Gromacki v. Armour & Co.,
76 F. Supp. 752.

Diesinger v. American & Foreign Insurance
Co., 2 F.R.D. 221.

“Conspiracy” means a combination of two or more persons by concerted action to accomplish an unlawful purpose or some purpose not in itself unlawful by unlawful means.

Kietz v. Gold Point Mines,
5 Wn. (2d) 224, 105 P. (2d) 71.

Hyak River Packing Co. v. Huglan,
143 Wash. 229, 255 Pac. 123.

Alaska S. S. Co. v. International Longshoremen's Assn. of Puget Sound, 236 Fed. 964.

Ransom v. Matson Nav. Co.,
1 F. Supp. 224.

There must be a preconceived plan to accomplish the purpose.

Sabin v. Frederick,

236 Mich. 501, 211 N.W. 71.

State of Mo., ex rel., and to Use of DeVault
v. Fidelity & Casualty Co., 107 F. (2d) 243.

Common design is of the essence of the conspiracy.

U. S. v. American Column & Lumber Co.,

263 Fed. 147, affd. 257 U.S. 377, 66 L.
Ed. 284.

Wills v. Lloyds,

6 Cal. (2d) 70, 56 P. (2d) 517.

The minds of the conspirators must meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged.

Kietz v. Gold Point Mines,

5 Wn. (2d) 224, 105 P. (2d) 71.

Dart v. McDonald,

107 Wash. 537, 182 Pac. 628.

The mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is insufficient.

Burton v. Maupin,

(Mo. App.) 281 S.W. 83.

Gerdes v. Reynolds,

30 N.Y.S. (2d) 755.

It is essential to create civil liability for conspiracy that there has been an overt act done by

one or more of the conspirators pursuant to the scheme and in furtherance of the object.

No. Ky. Telephone Co. v. So. Bell T. & T. Co.,
1 F. Supp. 576, *affd.* 73 F. (2d) 333, *Cert.*
den. 294 U.S. 719, 79 L. Ed. 1251.

Mox, Inc., v. Woods,
202 Cal. 675, 262 Pac. 302.

Harvey v. Tucker,
136 Kan. 61, 12 P. (2d) 847.

Complaint alleging tortious acts which were committed at a time clearly within bar of state statute of limitations was subject to dismissal, notwithstanding averment that conspiracy was continuing.

Moffett v. Commerce Trust Co.,
75 F. Supp. 303.

The cause of action if in conspiracy is barred by Section 165 of Remington's Revised Statutes, of Washington.

Mitchell v. Greenough,
100 F. (2d) 184.

A cause of action does not consist of acts but of unlawful violation of a right which the facts show.

Patten v. Dennis,
134 F. (2d) 137.

The complaint must allege damages.

Moffett v. Commerce Trust Co.,
87 F. Supp. 438.

Ransom v. Dollar S.S. Line,
2 F. Supp. 409.

The objection that the Complaint is verbose and redundant in violation of Rule 8 (a), 10 (b), and 12 (f) of the Federal Rules of Civil Procedure is properly taken by a Motion to Dismiss or by a Motion to Strike.

Bockelman v. Seaton,

4 F.R.D. 326.

Capdevielle v. American Commercial Alcohol Corp., 1 F.R.D. 365.

Buckley v. Music Corporation of America,
1 F.R.D. 602.

Attached to the Memorandum of Authorities is a brief analysis of the 92-page Amended Complaint, setting forth those instances in which Continental Casualty Company is referred to either directly or by general allegation regarding all defendants. The purpose of this analysis is to illustrate again the failure of plaintiff to show any concerted action or agreement between the parties hereto.

Respectfully submitted,

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Analysis of Complaint

Page 1—Between March 2, 1944, and August 18, 1950:

Plaintiff suffered substantial damages as a result of the hereinafter alleged overt acts of defendants, who wrongfully and maliciously conspired, combined and confederated together with

wilful and malicious intent to injure, defraud and damage defendant.

Page 1—12-7-43:

Philp signed as attorney-in-fact for Continental Casualty Company the Performance and Payment Bonds posted by Macri.

Page 5—4-21-44:

Macri, Philp, Goerig, and Continental Casualty, through Philp, its attorney-in-fact, attempted from beginning of subcontract to bankrupt plaintiff by not paying plaintiff per contract, by not performing the work or performing it badly.

Page 6—7-15-44:

Date of termination of joint venture between Macri, Philp and Goerig, which plaintiff alleges was effective as to plaintiff but not as to Continental Casualty.

Page 12—11-1-44:

Plaintiff employed McKelvy to sue Macri and Continental Casualty; plaintiff informed McKelvy that Macri was bonded by Continental Casualty. Mr. Skeel advised plaintiff that he couldn't hold Continental Casualty.

Page 22—1-3-45:

All defendants knew that Macri had done no preparatory work on Specification No. 1068.

Page 22—1-23-45:

All defendants knew that Macri was receiving payment for excavating as specified, although ac-

tual excavation was not according to specifications, and that, therefore, plaintiff had a claim against Macri.

Page 25—About October 15, 1945:

McKelvy advised plaintiff that the chances of holding Continental Casualty were slim.

Page 26—10-20-45:

Plaintiff insisted that McKelvy state the date suit would be filed against Continental Casualty and the Macris. Plaintiff then informed that McKelvy could not represent plaintiff because Macri was a good customer of Continental Casualty and Continental Casualty was one of McKelvy's largest accounts. All of the aforesaid acts by McKelvy were in furtherance of the original conspiracy of Macri, Philp, Goerig, and Continental Casualty, through Philp and McKelvy.

Page 27—10-22-45:

Plaintiff retained Olson to bring law suit against Macri and Continental Casualty and do all things necessary to protect plaintiff in all his rights. (Apparently plaintiff instructed Olson at this time to commence the conspiracy suit.)

Page 28—12-14-45:

Macri and Continental Casualty, through Philp and McKelvy, its agents, filed malicious suit in Oregon on Specification 1068.

Page 34—1-17-46:

After plaintiff's suit was filed in Yakima, the aforesaid conspiracy was furthered by Philp,

Goerig, Macri, and Continental Casualty by delaying, appealing separately and delaying payment as follows: Continental Casualty informed plaintiff of the joint venture in a secret letter to plaintiff's attorney.

Page 36—2-21-47:

Willard Skeel represented Continental Casualty in said Yakima suit (despite the quotation from the proceedings indicating that Willard Skeel appeared in Civil cause No. 246, the fact remains, of which the court may take judicial notice, that Willard Skeel appeared in such Civil Cause No. 250, to which plaintiff is not a party).

Page 62—5-1-47:

Judgment entered against Continental Casualty in plaintiff's suit.

Page 65—5-9-47:

Motion for new trial by Continental Casualty.

Page 66—5-20-47:

Motion denied.

Page 67—5-20-47:

Continental filed Notice of Appeal.

Page 67—5-26-47:

Continental filed Supersedeas bond.

Page 73—2-11-49:

Circuit Court of Appeals affirmed plaintiff's judgment.

Page 74—4-5-49:

Petitions for rehearing denied.

Page 85—5-14-49:

Continental Casualty filed Petition for Writ of Certiorari in the Supreme Court.

Page 85—6-20-49:

Petition denied. Continental filed Petition for Rehearing.

Page 85—10-10-49:

Continental's Petition for Rehearing denied.

Page 85—11-4-49:

Continental Casualty paid judgment. After argument with plaintiff concerning deletion of the words "interest, costs, etc.," on back of draft, which words were used in furtherance of Defendants' concerted plan and would have deprived plaintiff of his rights to bring this suit.

Page 85—11-9-49:

Draft paid.

Page 90:

In plaintiff's discussion with McKelvy concerning Mr. Olson, plaintiff revealed that he contemplated this suit at the time he instituted his action in Yakima.

Page 92:

As a result of the aforesaid intentional concerted conspiracy of Defendants, plaintiff suffered One Million Dollars (\$1,000,000) damages to his credit and business and damage in the preparation and conduct of the aforesaid litigation.

[Endorsed]: Filed Feb. 19, 1951.

Law Offices

Skeel, McKelvy, Henke, Evenson & Uhlmann
Insurance Building
Seattle 4

February 16, 1951

Millard P. Thomas,
Clerk, U. S. District Court,
United States Court House,
Fifth Avenue and Spring Street,
Seattle 4, Washington.

Re: #2673 Schaefer v. Sam Macri, et al.

Dear Sir:

We hand you original and one copy of defendant, W. R. McKelvy's, Motion to Dismiss, Motion for Additional Security for Costs, Affidavit of W. Paul Uhlmann, Supplemental Memorandum of Defendant, W. R. McKelvy in Support of Motion to Dismiss, Alternate Motion to Strike and Affidavit of Service.

This cause was assigned to the Honorable Dal M. Lemmon. I am advised by your office that Judge Lemmon does not intend to return to Seattle in the near future. We, therefore, are in a quandary as to how to note our motions for hearing. It is agreeable to this defendant to submit the matter to Judge Lemmon on the memorandum and this letter.

As you will note from the Affidavit of Service, we are sending a copy of this letter to the plaintiff with the pleadings. Therefore, if it is agreeable to him to submit the motions on the memorandums

and the record, we suggest that he write to you to that effect.

Our stipulation to submit the matter in this manner, however, is conditioned upon your forwarding to Judge Lemmon the Volumes 1 and 5 of the transcript of record in the cause entitled "In the Supreme Court of the United States, October Term, 1948, Continental Casualty Company, Petitioner vs. M. C. Schaefer, Respondent," and the transcript of the record in the case presented to the United States Circuit Court of Appeals for the Ninth Circuit, Nos. 11722, 11723, 11724, 11725 and 11726, which we will file with our motions in your office.

Our request in this matter is based upon *Atlantic Fruit Co. v. Red Cross Line*, 5 F. (2d) 218, which holds that the federal courts take judicial notice of any reported decisions and in doing so may examine the records.

Our motion to strike is based on the contention that the excerpts of the transcripts set forth in the amended complaint are in fact transcripts of the records in the Causes Nos. 11722, 11723, 11724, 11725 and 11726, U. S. Circuit Court of Appeals, Ninth Circuit, and were not a part of the proceedings in the Schaefer case except that a portion of the transcript in these five cases by stipulation was apparently received in evidence in the Schaefer case; the point being, that Willard E. Skeel was not attorney of record for Continental Casualty Company in the Schaefer case and did not participate at any time in the Schaefer case. The Schaefer case is reported in 173 F. (2d) 5.

We will be glad to have you advise us if we should do anything further with reference to this matter; or if Judge Lemmon intends to return to Seattle in the near future, we will be glad to note the motions to be heard before him.

Very truly yours,

/s/ W. PAUL UHLMANN.

WPU/mm

Encls.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Washington,
County of King—ss.

A. P. Curry, being first duly sworn on oath, deposes and says: That at all times herein mentioned I was and am now a citizen of the United States, over the age of twenty-one years, competent to be a witness in the above-entitled action, not a party thereto and in no wise interested therein.

That on the 16th day of February, 1951, I served the plaintiff in the above action with Defendant, W. R. McKelvy's, Motion to Dismiss, Motion for Additional Security for Costs, Affidavit of W. Paul

Uhlmann, Supplemental Memorandum in Support of Motion to Dismiss, Alternate Motion to Strike (all referring to Plaintiff's Amended Complaint) and a copy of a letter dated February 15, 1951, directed to the Clerk of the above-entitled court by placing in the United States mail with postage prepaid and registered, return receipt requested, a letter enclosing said pleadings and copy of letter, directed to the plaintiff, M. C. Schaefer, at 3535 E. Burnside Street, Portland 15, Oregon.

/s/ A. P. CURRY.

Subscribed and sworn to before me this 16th day of February, 1951.

[Seal] /s/ WILLARD E. SKEEL,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF W. PAUL UHLMANN

State of Washington,
County of King—ss.

W. Paul Uhlmann, being first duly sworn on oath, deposes and says: That he is attorney of record for defendant, W. R. McKelvy. That security for costs has been provided by plaintiff by depositing with the clerk of the court the sum of \$250 as

security for all defendants. That each of the defendants have entered appearances and will separately defend the action and there is no community of interests between the defendants so far as the preparation of the defense is concerned. Therefore each defendant must anticipate substantial expense to defend this action. That separate depositions and other procedures will be required in the defense of this action and \$250 is not sufficient to cover the expenses of all of the defendants. That it is affiant's opinion that the rule of court requiring security of costs contemplates the security of each defending defendant separately appearing to be protected against a nonresident plaintiff in the sum of not less than \$250.

/s/ W. PAUL UHLMANN.

Subscribed and sworn to before me this 14th day of February, 1951.

[Seal] /s/ WILLARD E. SKEEL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION FOR ADDITIONAL
SECURITY FOR COSTS

Comes now the defendant, W. R. McKelvy, and moves for an order directing the plaintiff to file additional security of costs so as to secure each defendant named in an amount of not less than \$250.

This motion is based upon the records and filed herein and upon the Affidavit of W. Paul Uhlmann, attached hereto.

SKEEL, McKELVY, HENKE, EVENSON &
UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 16, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS OR, IN THE
ALTERNATIVE, MOTION TO STRIKE

The defendants, Sam Macri, Don Macri and Joe Macri, move the Court to dismiss the action against them and each of them for the following reasons:

(1) The Complaint fails to state a claim against this defendant upon which relief can be granted.

(2) The action is barred by the Statute of Limitations.

(3) The Complaint is in violation of Rule 8 (a), 10 (b) and 12 (f) of Federal Rules of Civil Procedure.

And in the alternative, but without waiving the foregoing Motion to Dismiss, and specifically insisting upon the same, this Defendant moves the Court to strike the action on the ground that the Complaint is verbose and redundant.

/s/ GRANVILLE EGAN,
Attorney for Above-Named
Defendants.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff:

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle, Washington, on the day of, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ GRANVILLE EGAN.

[Endorsed]: Filed Feb. 21, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RE-
SISTING MOTION OF DEFENDANT W.
R. McKELVY TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT

The amended complaint should be sustained because:

1. The Statute of Limitations does not bar this action.

The running of the Statute of Limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Co.*, 260 Mo. 212, 169 SW 145 the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Ind. 660, 161 NE 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the statute of limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colo. 365, 21 P (2d) 182; 41 Hun 645, 3 N.Y.S.R. 309.

In *Northern Kentucky Tel. Co. vs. Southern Bell Tel. Co.* 73 F (2d) 333, 97 A L R 133 is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the con-

spiracy and during its existence. See also the annotation in 97 ALR 137.

It must also be noted that in this action the Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by Defendant.

The case relied on by defendant, i.e., *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of Plaintiff's original complaint.

2. The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

In 168 P (2d) 797 *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

Here plaintiff alleges in Par. III, beginning line 23, pg. 1, that between 3-2-44 and 8-18-50 Defendants did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plain-

tiff suffered the damages more fully alleged in Par. IV, line 9, pg. 92.

The principal allegations of conspiracy are that the Defendants Macri on 12-7-43 signed a government contract with the Bureau of Reclamation for certain work on the Roza Irrigation Project near Yakima, Washington, and on the same day Defendant Continental Casualty Co. by the agent and attorney in fact, the Defendant, Clyde Philp, issued the performance and payment bonds required by said Bureau of Reclamation, but only four days later on 12-11-43 this same Clyde Philp, together with Defendant A. J. Goerig entered into a silent partnership agreement with each other and also as joint venturers with Defendants Macri in the performance of said general contract with Bureau of Reclamation, none of which facts were known to Plaintiff until 1946.

That Plaintiff on 3-14-44 entered into a subcontract with Defendants Macri to do certain form, steel and concrete work on said Roza Irrigation Project, under which certain preparatory work was to be done and certain materials were to be furnished by Defendants Macri (Items I through 5 of specific allegations under Par. III).

That Defendants Macri purposely defaulted in the furnishing of material and performance of their preparatory work from 3-14-44 to 7-31-44 so that Plaintiff could not commence pouring until 7-31-44, for the purpose of causing plaintiff to become bankrupt and to cause plaintiff severe financial hardship and in fact did cause severe hardship and almost

caused bankruptcy.

On 7-31-44 Defendants Macri then agree orally to expedite their work so that Plaintiff could complete his by 9-15-44, but again from 7-31-44 to 10-31-44 the same wilful defaults were committed by Defendants Macri and they further violated their contract with Plaintiff by further refusing and failing to make payments to Plaintiff as required by the terms of the subcontract with Plaintiff.

On 11-1-44 Defendant McKelvy became a member of the conspiracy. On that date plaintiff employed Defendant McKelvy, made full disclosure of the acts of Defendants Macri, supplied him with memoranda of the conversations and meetings and oral agreements with said Macris, that Defendant Continental Casualty Co. might be involved; and sought the services of Defendant McKelvy to terminate the said subcontract with the said Macris and sue for the reasonable value of the work done by Plaintiff.

That the firm of which Defendant McKelvy is a partner, at that time and for years before and since represented Defendant Continental Casualty Co., but despite the conflict of interest, Defendant McKelvy made no disclosure to Plaintiff that his firm represented Continental Casualty Co.; and Plaintiff did not discover this fact until much later; that Defendant McKelvy accepted Plaintiff's employment and agreed to take steps to accomplish the desired result, by negotiation if possible and by suit if necessary. By inter-office memorandum dated 11-8-44 (photostat at end of item 16 following page 20) Defendant McKelvy by his own handwriting indicated he felt

there was a good cause of action and that the remedy was in quantum meruit; yet the circumstances and facts alleged in items 6, pg. 5; 8, pg. 6; 17, 18, 19, 20, 21, 21A on pg. 22-23-24 and ending top of pg. 25; and particularly in Item 24, pg. 25; Item 25, pg. 26, clearly show that the advice given and actions taken by Defendant McKelvy were all intended to and in fact did protect McKelvy's client, Continental Casualty Co., and also the Macris, and were intended to and in fact did further injure and damage plaintiff in that Defendant McKelvy first prevailed upon Plaintiff to complete the work rather than rescinding or terminating the contract; by not terminating the second subcontract he made it possible for the totally unfounded suit to be filed in Multnomah County, Oregon (Item 28, page 28).

Further in that he made possible the asserted dissipation or rumored possible secretion of assets by Defendants Macri, and thereafter advised Plaintiff to follow a course of action amounting to fraudulent conveyance of assets with possible criminal overtones, and finally when none of these succeeded purposely attempted to permit Plaintiff to delay filing suit against Defendants Macri until the statute of limitations had run, and but for the diligence of Plaintiff might have succeeded in any one of his efforts.

That defendants Macri then furthered the conspiracy by filing a malicious suit in Portland which was completely without foundation and known to be so and intended to dry up Plaintiff's credit and

thus render impossible the prosecution of his suit in Yakima, Washington; that their action in Portland did dry up his credit and only by the most extreme application of perseverance could Plaintiff survive at all in his business operations there, and even yet has not fully recovered from the effects of said suit and has lost large sums of money as the direct result thereof.

Finally after trial of the Yakima suit by another attorney (who did what McKelvy had agreed to do) the Defendants Macri and Continental Casualty Co. by unfounded actions and by abuse and misuse of the judicial process, all in furtherance of the original conspiracy, dragged the matter on through separate appeals and wilful delays in making settlement after final judgment on appeal to 11-9-49, and on 8-16-50 Defendant McKelvy again entered the picture by trying to pressure Plaintiff into making any kind of payment on his bill to Plaintiff to preclude the filing of the present case.

In the light of all authorities cited by Defendant and of *Lyle vs. Hoskins* 168 P (2d) 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and inter-related activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage Plaintiff amply support Plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

3. As to Defendant's objection that the com-

plaint is verbose, the authorities and argument last above are sufficient to meet this objection, as such allegation of the specific statements, omissions and actions is necessary to state a cause of action. In the motion of Defendant to Plaintiff's first cause of action the position taken was that the complaint contained merely conclusions and not ultimate fact from which the conclusion could be drawn. Now that Plaintiff alleges the facts in detail to support the conclusion he seeks to have them stricken as being prolix and verbose. Plaintiff contends that the facts as stated are necessary and proper.

4. As to Item 4 of Defendant's Motion, there is a misconception of Plaintiff's allegations. Plaintiff alleged only that the firm of Skeel, McKelvy, et al., represented Continental Casualty Co. at the time Defendant McKelvy was employed by Plaintiff and continued thereafter to represent them and in fact represented Defendant Continental Casualty Co. on the first day of the trial of Plaintiff's case vs. Macris and Continental Casualty Co. in Yakima, as more fully appears from the transcript set out in full. Thereafter it is admitted that at least of record in that case other counsel represented Continental Casualty Co. and there is no inconsistency whatsoever.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RE-
SISTING MOTION OF CONTINENTAL
CASUALTY CO. TO DISMISS OR TO
STRIKE

Defendant's proposition of law and citation of supporting authorities is generally conceded to be correct. Plaintiff contends, however, that the facts alleged in his amended complaint do state a cause of action as to Defendant Continental Casualty Company.

The essential facts alleged as to participation by Defendant Continental Casualty Co. in a conspiracy to injure, defraud and damage Plaintiff, are as follows:

1. From the inception of work by Plaintiff in 1944 on his subcontract ostensibly with the Defendants Macri for concrete work at Yakima, Washington, til August, 1950, there was a web of intrigue, behind the scenes activity, undisclosed parties whose interests were interlocking with one another and antagonistic to Plaintiff. One of the principal participants was Continental Casualty Company.

Thus Plaintiff was made the brunt of wilful, malicious and intentional activity—so far as then known—by defendants Macri intended to discredit, bankrupt and ruin Plaintiff from 1944 when he started work on the Roza Irrigation Project, until 1950. But as the plot unfolded it became apparent that all the initial phases of the common scheme

were joined in by Continental Casualty Company behind the scenes and off the record and later Continental Casualty Co. lead the way.

Thru its agent and attorney in fact, the Defendant Philp, Continental Casualty Company issued performance and payment bonds, guaranteeing performance and payment by the Defendants Macri at the same time the said Philp was also a partner with one Goerig and jointly Philp and Goerig were silent joint venturers with the Defendants Macri on this work. Thus all the intentional acts ostensibly of the Macris, were actually the acts of Continental Casualty Co.

Then follows a complex series of actions, by the Macris, (and although not at the time known to Plaintiff) also by the Continental Casualty Company thru its agent Philp and by Philp and Goerig personally attempting to and almost succeeding in bankrupting Plaintiff and causing severe loss and damage.

Then there is injected into the conspiracy one W. R. McKelvy, attorney for Continental Casualty Company (again a fact not known to Plaintiff until a later date) who advised Plaintiff to follow courses of action which show beyond any equivocation that said McKelvy was working against Plaintiff for Continental Casualty Company, Macris and their joint venturers, Philp and Goerig and only by extreme diligence was Plaintiff able to prevent all the parties from succeeding in their scheme.

McKelvy also dealt very closely with one Holman the ostensible attorney for the Macris, but who

had formerly been associated in the office with McKelvy and who worked in close harmony with McKelvy at all times, including the filing of a totally groundless suit in Multnomah County, Oregon, when it became apparent that all other attempts to bankrupt Plaintiff were failing.

With defendant's general proposition of law and his citation in support thereof Plaintiff has no serious disagreement. Plaintiff does contend that the facts alleged in his amended complaint do state a cause of action as to Defendant Continental Casualty Company.

The essential facts, as to this defendant, are:

1. In 1943 its agent and attorney in fact, the Defendant Philp, signs performance and payment bonds for Defendants Macri and while still in the employ of Defendant Continental Casualty Co. its said agent Philp became a partner with the Defendant Goerig and Philp and Goerig became silent joint venturers with the persons being bonded by Continental Casualty Co. namely the defendants Macri. All this is known by Continental Casualty Company but not Plaintiff until several years later when Plaintiff filed a suit.

Then came the suit in Yakima which Continental Casualty Company and the Macris lost and which the Defendants Macri did not appeal within the time provided, but Continental Casualty Company did and thereafter the Court ruled that the Macris could appeal, despite being barred by the time limitation since Continental Casualty Company did ap-

peal within the permitted time. At all times thereafter including appeal to the U. S. Supreme Court, Continental Casualty Company led the way on this series of litigation and appeals. It did not follow along with its prime contractor.

Thus by a series of subversive maneuvers known to and acquiesced in by Continental Casualty Co. thru its agent and attorney, the Defendant, McKelvy, and later directly by Continental Casualty Company in leading the way and carrying the ball at all times after adverse judgment in Yakima, Defendant Continental Casualty Company was one of the prime participants in and causative factors of Plaintiff's damages.

Clearly, while the complaint necessarily is complex and difficult to phrase in a concise manner, it certainly does state facts supporting the general allegation of Defendant Continental Casualty Company being a participant in the conspiracy.

2. As to the Statute of Limitations point reference is made to Plaintiff's memorandum on McKelvy's similar motion.

3. As to the objection that complaint is verbose, Plaintiff concedes that the law is fairly stated, but maintains that any lesser allegation of details would possibly defeat the complaint on the grounds that the allegations are mere conclusions, rather than ultimate facts from which the conclusion of conspiracy could be drawn.

The authorities are so numerous that corporations are liable for the torts of their officers, agents

and employees as hardly to require citation, but attention is drawn to 13 Am Jr Corps. Sec. 1131, pg. 1056, which states the general rule and also the rule that specifically as to conspiracy a corporation is liable for acts of its officers, agents and employees in conspiracy with other persons.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT RESISTING AL-
TERNATE MOTION OF DEFENDANT
McKELVY TO STRIKE

1. The record shows on its face that Mr. Skeel, of the firm of Skeel, McKelvy, et al., did represent Continental Casualty Co. in Plaintiff's case, No. 246, in Yakima on the first day of the hearing and that thereafter other attorneys appeared. No argument is necessary, as the record speaks for itself.

2. Line 12, page 28, was an attempt on the part of Plaintiff to plead that the suit filed in Multnomah County, while admitted of record only by the Defendants Macri, was in fact the act of the other defendants as well and as such should be permitted to stand.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

HEARING ON DEFENDANT'S, W. R.
McKELVY, MOTION TO DISMISS

HEARING ON DEFENDANT'S, CONTINEN-
TAL CASUALTY COMPANY, MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM

Before: The Honorable Dal M. Lemmon,
Judge.

January 11, 1951, 10:00 A.M.

Appearances:

M. C. SCHAEFER, Per se,
Appearing on his own behalf.

A. P. CURRY, ESQ.,
SKEEL, McKELVY, HENKE, EVENSON &
UHLMANN,

Appeared on Behalf of the Defendant, W.
R. McKelvy.

CARL H. CROSON, ESQ., and
WILLARD HATCH, ESQ., CROSON,
JOHNSON and WHEELON,

Appeared on Behalf of the Defendant Con-
tinental Casualty Company.

Whereupon, the following proceedings were had
and done, to wit:

The Clerk: M. C. Schaefer, an individual, versus Sam Macri, Don Macri and Joe Macri, individuals; W. R. McKelvy; Continental Casualty Company, a corporation; A. J. Goerig and Clyde Philp, individuals Defendants' Motions to Dismiss.

Are the parties ready?

Mrs. Curry: Defendant McKelvy is ready.

Mr. Croson: Defendant Continental Casualty is ready, your Honor.

Mr. Schaefer: Yes.

The Court: You may proceed. [2*]

Mrs. Curry: Your Honor, I am Mrs. Altha P. Curry, Counsel for Mr. McKelvy, associate of the office of Skeel, McKelvy, Henke, Evenson & Uhlmann.

This is the defendant, McKelvy's Motion to Dismiss. There are several grounds set forth in the motion. I will address the Court primarily on number 1, that there is no bond or stipulation of costs filed and the plaintiff by his allegations is a non-resident of the State of Washington; 2, the Complaint fails to state a claim against the defendant upon which release can be granted; and 3, the cause if any, has been barred by the Statute of Limitations, either under Sections 159 of Remington's Revised Statutes or Section 165 of Remington's Revised Statutes.

I would first like to review the Complaint because this has been written by a man who is not a lawyer and has much extraneous matter and it is best to get a picture of what it is.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

For the convenience of the Court, I made an outline and attached it to the memorandum, the first memorandum, and called it an analysis of the Complaint. All it is, is just an outline of the Complaint.

Paragraph I, of course, is just jurisdictional. It does allege that the plaintiff is a resident of Oregon. Paragraph II, is quite long and involved. [3]

“(a),” under the sub-division (a), simply alleges, and briefly, all that this case sets forth is that the plaintiff had a sub-contract—that Macri apparently was the contractor. Schaefer had a sub-contract on the Roza Dam Project; and that he had a claim against the Macris.

The Court: I think in the instance of saving time, you may assume that I have read the pleading.

Mrs. Curry: Very well, your Honor. Then the Complaint simply alleges that the services of McKelvy were retained; that on October 20th, 1945, McKelvy told the plaintiff——

The Court: It doesn't allege the date of the retaining.

Mrs. Curry: No. It alleges, though, that on October 20, 1945, McKelvy advised the plaintiff he could not represent him in a suit against the Macris. Thereupon, he engaged counsel, was successful, the case was filed in Yakima.

There is no allegation and there was no connection of our office or McKelvy with that litigation after October 20, 1945. He was successful in the litigation, in fact, I believe he got a judgment of some \$50,000 or \$60,000—and that is all [4] there

is to it—and that he divulged certain information to McKelvy pertinent to the litigation and himself, and that McKelvy did not tell him that he could not represent him, because our office were counsel for Continental Casualty Company, until October 20th, 1945.

I believe this does not state a cause of action, but if it does it is barred by the Statute of Limitations. If it is a contract or a mal-practice suit against McKelvy, it is barred by 159 in three years. If it is a conspiracy case, it is barred under 165, a two-year Statute of Limitation, which definitely has been held by the case I have cited on page 3 of the first memorandum, Mitchell versus Greenough, 100 F. (2d) 184, a case coming out of this jurisdiction.

For convenience, because the Court is not familiar with our Statute of Limitations, I have brought the statute here.

The Court: Well, looking at the pleading and with the assumption that if there are faults and defects in it, those faults and defects might be cured by an amendment, the rule as I understand it on limitations of actions in conspiracy cases, the limitation begins to run upon the occurrence of an [5] overt act resulting in damage, or the last of a series of such acts.

In the pleading, what date is alleged as the last of those series of acts?

Mrs. Curry: So far as defendant McKelvy is concerned, it is October 20th, 1945.

The Court: If there were a conspiracy and McKelvy was a member of the conspiracy, anything

done in furtherance of the conspiracy would be chargeable, of course, to all of the conspirators. Assuming that allegations could be properly set forth, when was the last act charged against any of these defendants which might be alleged in furtherance of the conspiracy?

Mrs. Curry: There is no conspiracy alleged, though, I think, your Honor.

The Court: Assuming it could be alleged—taking that assumption. If the pleader had alleged that these parties had conspired together to do these things.

Mrs. Curry: I don't know. There is nothing that is an overt act or combination of individuals in the Complaint, there, to which you can point to a conspiracy with the possible exception of what transpired prior to October 20, 1945. There was some [6] litigation, yes, but there was no connection of the defendant, McKelvy, with that litigation.

The Court: I think probably you would agree it would be an abstract principle of law I have stated to you, that the statute runs from the last of a series of acts if it were charged that those acts were in furtherance of the conspiracy.

Mrs. Curry: Yes. So far as any of the defendants are concerned, I can see nothing so far as defending the litigation that could in any way be chargeable as a conspiracy, because our Court here has held that a person can prosecute a suit. Certainly, if they can prosecute a suit without any inquiry as to their intention——

The Court: As to your Statute of Limitations,

I think that was your third point, but you did mention some citation.

Mrs. Curry: So far as conspiracy is concerned, it is Section 165, the 2-year Statute of Limitations which is a catch-all in our Statute of Limitations. It is any other suit. If you want, I will read it to you. *Mitchell versus Greenough*, 100 F. 2nd, page 184. That came out of the Eastern Washington Court. That was a case arising in Eastern Washington. [7]

165, just for your information, is "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

159 applies to negligence and to an implied contract. It is a 3-year Statute of Limitations.

Section 4 of that reads, "An action for relief upon ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery of the aggrieved party of the facts constituting fraud."

It is my contention that if conspiracy is alleged, the 2-year Statute of Limitations applies if there is a cause against McKelvy on each malpractice or breach of contract or fraud. It runs from October 20, 1945.

Now, your Honor, I would like to address myself upon the question of conspiracy. I assume that the purpose of this Complaint was to allege a cause of action and conspiracy; otherwise, they could not incorporate the other defendants.

The Court: You first mentioned the point that there was no bond filed. Are you stressing that?

Mrs. Curry: Well, except this, that I would hate to come back here and argue this again after [8] the bond is filed, so I would just as soon present the argument on the whole matter.

But I would like to call attention that our local Rule 50 requires a bond to be filed when the Complaint is filed for a non-resident plaintiff.

The Court: Does it specify the amount?

Mrs. Curry: It specifies it shall be in the sum of \$250. You will note we have moved for a bond of \$1,000. I think at least a \$500 bond should be required. And the Court has——

The Court: Was the \$250 bond filed, though?

Mrs. Curry: No bond has been filed at all.

“If the bond is not filed within the time specified or if the bond filed is found insufficient, the Court may order that a sufficient bond be filed within a specified time and if the order is not complied with the Clerk shall dismiss the action as of course for want of prosecution.”

But the requirement is that upon the filing of the Complaint a \$250 bond should be filed by a non-resident, and there was no bond filed in this case.

The Court: Of course, the Court would have the authority to relieve the plaintiff of his default and order the filing of the bond. [9]

Mrs. Curry: At a later time.

The Court: Yes.

Mrs. Curry: Yes. But I don't want to forego that requirement. Our statute in the State Court is that we are entitled to the bond as a matter of course.

May I address myself to the question of conspiracy? I have filed two memorandums; 1, I read this Complaint and determined because the word "conspiracy" had been used, that it was an attempt to allege a cause of action in conspiracy.

I later, after a little consideration, filed a supplemental memorandum on the theory that it may be possible to claim that there was a cause of action alleged against Mr. McKelvey, either for malpractice, negligence or breach of contract or fraud.

So far as conspiracy is concerned, we had a very famous case in this Court, Ransom versus Dollar SS Co.

Judge Netterer decided both of them and because of their importance had both of them reported. The first one was found in 1 F. Sup. 244. The second one I have cited in my memorandum in 2 F. Sup. 409. Edith Ransom was an actress and she brought many suits in this jurisdiction. She had been [10] quite successful as a movie actress but got herself into a great deal of difficulties and landed in Seattle from Honolulu. She brought these suits by herself without an attorney, although in one of the Ransom cases she did have an attorney. She charged a conspiracy to shanghai her out of Honolulu and said that she was doped and put on one vessel and then taken off and forced onto the other, and when she got here they put her in an insane ward. She sued

the Dollar Steamship, Matson, and the employees and someone else.

But the Court said there was no cause of action in conspiracy; that if he had any cause of action, it would be against each individual; in that case, one for assault, one for libel and one for malicious something or other; that a cause of action in conspiracy exists only if there is a combination of persons to accomplish an unlawful act or to accomplish a lawful act unlawfully. But there must be a combination of persons, a preconceived plan. These two cases also involve another case of Judge Netterer entitled Puget Sound Power and Light Company versus Asia, reported in 2 F. 2nd. 491.

Judge Netterer, in a second Ransom case, leans heavily upon his former decision in the Asia [11] case. But he pointed out that it must be a preconceived plan. I believe it is stated in one of those cases that the conspiracy has nothing to do with things already done; it only has to do with things planned for the future, expected in the future.

In the Asia case, the basis of the conspiracy, the Asia case was prosecuted by very eminent counsel on both sides. In that case the foundation of it was the bringing of an action; that was the basis of the conspiracy.

The Court said, "A person fancying a right has a right to sue, and the law does not inquire into his motives." Likewise, in this case, the defendants—regardless of McKelvy—fancying a defense, would certainly have a right to defend the action.

In particular there are two things in these three

cases. One is that you have to have a combination of persons to accomplish an unlawful purpose or a lawful purpose unlawfully; and also that the words "conspire" mean nothing; that you must allege facts from which the natural inference of a pre-conceived plan or a combination to do a lawful act unlawfully or an unlawful act must be a natural inference; that the words "conspire" are just conclusions. As Judge Netterer said in one case, [12] the word is impotent.

He says, "The word conclusion must be predicated upon facts and circumstances showing collusion to show they were going to act jointly with an unlawful enterprise." In addition to the fact that you must have these elements, it is also necessary to allege in the Complaint a malicious intention, and that does not appear in this Complaint in any particular. It must be shown that the combination was with a malicious intent to accomplish these causes.

Then another element, which is lacking so far as conspiracy is concerned, is damage. There is no allegation of damage. There must be an allegation of damages and it must be shown that the damage is the natural consequence of the unlawful acts.

As is said in one of these cases, "Damage is the gist of the action." And quoting Cooley on torts, "And as it is the wrong accomplished"—to have a cause of action of any kind you must have deprivation of a right.

The Court: If there was agreement to do the injury and nothing was done in furtherance, there would be no damage from the agreement.

Mrs. Curry: Yes. Also, the damage must [13] be shown to be the proximate result of the agreement and the concerted action of the overt act, as you have put it. There must be some damage from it.

What does this Complaint allege—that he got another lawyer and as a consequence won his law suit. It might have been if there was a combination, at all, that it resulted in his benefit, because certainly he was successful in his litigation, by his own pleading.

The only possible cause of action that could arise, here, was a breach of contract on the part of McKelvy for not bringing the suit when he agreed—according to the allegation in the Complaint—that he agreed to do so.

Now, we have a strong case on that in this jurisdiction; 78 W. My contention is there is not even any fraud alleged. 78 W. 662. The only possible thing, here, is a breach of contract.

In this case, Cornell versus Edsen, the headnote reads, “An action for damages against an attorney for wrongfully dismissing an action and concealing the fact is not an action for relief upon the ground of fraud but it is a breach of contract.” In that case the question was whether or not the Statute of Limitations, Section 4, with reference to [14] fraud—the cause of action arising upon discovery would apply, or when the overt act was done which was a breach of contract. He dismissed the cause of action. The Court held that he breached his contract if it was a cause of action in fraud.

I can see that concealment in many cases may be the basis of a suit in fraud. But in those instances, in this jurisdiction, the cases I have cited all speak of the fact that concealment may be the basis of fraud, but it must be intentional; and the Courts say with intent to deceive.

Now, your Honor, I want to explain—because you may not be familiar with our theory of fraud because it is somewhat different in many jurisdictions. It is true, in this jurisdiction, a misrepresentation of a fact susceptible of knowledge—pardon me—a misstatement of facts susceptible of knowledge or an opinion with intent to deceive is fraud. Most jurisdictions hold that any misstatement must have an intent to deceive. Our jurisdiction holds that any misstatement of fact is in itself, although innocent, the basis of fraud. Be that as it may, all our cases that have to do with concealment, recognizing it as the basis of a suit for fraud, require that it must be with an intent to deceive. [15]

The Court: May I inject this, here? An action in conspiracy is an action in tort, is it not?

Mrs. Curry: Yes, your Honor.

The Court: If as a part of the conspiracy one of the overt acts in the conspiracy is the breach of a contract, nevertheless the action still being one in conspiracy is a tort? In other words, in furtherance of a preconceived plan, and in carrying out that preconceived plan if one of the conspirators breaches his contract, that doesn't change the nature of this action; the action is still in tort—the action for conspiracy.

Mrs. Curry: If there is a conspiracy. But then you have to have a combination of individuals.

The Court: Well, of course, I am looking forward to the possibility and exploring the possibility of curing faults in this Complaint by amendments thereto.

Mrs. Curry: I am addressing myself to this Complaint.

The Court: You are addressing yourself to this proposition, that if a conspiracy is not alleged in this Complaint is there a cause of action otherwise alleged against the defendant McKelvy.

Mrs. Curry: Yes. I don't know what the [16] purpose of this Complaint was; and the only basis of any law suit that I could see would be one against McKelvy, individually.

The Court: At least you have got the assumption that the plaintiff is attempting to plead a conspiracy.

Mrs. Curry: I am looking at it from the light of the actual facts, too. There is no conspiracy alleged and I know there was no connection of our office with this litigation, subsequently, so how could there be a conspiracy? That is the actual fact.

The Court: Well, either factually or inferentially it appears in this Complaint allegations of a breach of attorney's obligation to the client in divulging confidential information, is it not?

Mrs. Curry: No. He just said that he made statements to McKelvy——

The Court: He has alleged that McKelvy acted in close concert with the counsel.

Mrs. Curry: No, he doesn't. He is referring to a former associate of the office, Tom Holman, in that, but there is no connection of McKelvy in this litigation in this Complaint.

The Court: "Having worked in close harmony with [17] the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvy." That is on page 6 of the Complaint, line 20 or 21.

Mrs. Curry: No. He is referring to Tom Holman, the attorney for the Macris, there. "Had formerly been associated in the same office with McKelvy."

The Court: To read from line 15, "And further in that defendant McKelvy at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris' said attorney having formerly been associated in the same office with McKelvy."

Mrs. Curry: "Having formerly been associated."

The Court: You probably are arguing from facts which are not alleged in here. I am just taking the Complaint as it appears.

Mrs. Curry: Your Honor, that "Having worked in close harmony" means nothing more than conspiracy.

The Court: I am just trying to gather from [18] this pleading what the pleader had in mind.

Mrs. Curry: There is no allegation of fact showing that he worked in close harmony.

The Court: I agree with you that one might work in close harmony with one and do no wrong at all. And in this instance McKelvy might have worked in close harmony with counsel for the Macris without causing any harm to anyone.

Mrs. Curry: If he worked in close harmony with anyone, it was with the plaintiff, because he gave him all of the assistance he could.

There is no allegation of damage, though, in this Complaint.

“There exists no civil action for a conspiracy, and particularly is this true in the national courts. An action may lie for damages suffered by reason of torts committed pursuant to a conspiracy but no action for damages lies for the conspiracy alone. ‘The gist of such actions is not * * * the conspiracy, but it is the damages for which the wrongdoer and all who conspire with him are liable.’ ”

I submit there is no cause of action in conspiracy because, so far as McKelvy is concerned or anyone else, [19] there is no allegation of a combination or a preconceived arrangement which is necessary. There is no allegation of malicious intent. There is no allegation of damages. There is no allegation at all of a conspiracy except the word “conspire” which is simply a conclusion.

I would suggest that your Honor explain to counsel or to the plaintiff who has no counsel that on

these motions we restrict ourselves to the allegations of the Complaint and not to the evidence. I have an idea he has some evidence.

Mr. Croson: May it please your Honor, my name is Carl E. Croson. My associate, Willard Hatch, is now in the Superior Court and will be here before the hearing is concluded, I am sure. We represent the Continental Casualty Company, one of the defendants.

At the very opening of my presentation, if your Honor please, I just want to call attention to the places where the Continental Casualty Company, a corporation, is mentioned in this pleading. And, of course, our motion is directed to this pleading.

I don't know what the pleader might have in mind that he can plead, but this is the pleading that is before us and to which we are directing [20] our motion that it does not state facts sufficient to constitute a cause of action against the Continental Casualty Company.

Paragraph I alleges Continental Casualty Company is a corporation doing business in the State of Washington.

Then in paragraph II, that "during the times herein complained of defendants"—now, there are a number of defendants and when the word "defendants" is used we must have in mind that there are three Macris doing business as general contractors. Then there is W. R. McKelvy, the attorney complained of; the Continental Casualty Company, a corporation; A. J. Goerig and Clyde

Philp, individually. All of those are covered by the word "defendants."

The Court: At what line does that appear?

Mr. Croson: Paragraph II, page 1, line 19, "That during the times herein complained of, defendants conspired"—now, the word conspired is used—"to injure, defraud and damage Plaintiff in the following particulars."

Now, he sets out the Bill of Particulars, then, in which the Plaintiff complains that he had been engaged as a concrete contractor and general contractor. On or about the 15th day of March he [21] entered into a sub-contract with the Macris being the prime contractor. And then, under (b) that the Plaintiff posted bond as required and so forth.

In paragraph (c), in this Bill of Particulars as to what the Defendants did, "Macri and Company grossly breached the terms of said sub-contract by not paying sums due Plaintiff; by not furnishing suitable materials, by not supplying said materials timely."

Then in paragraph (d) the "Plaintiff thereupon retained the services of the law firm of Skeel, McKelvy, Henke, Evenson & Uhlmann of Seattle, Washington, and particularly the Defendant W. R. McKelvy, and made full disclosure."

About the middle of that and about lines 20 and 21, if your Honor please, the eye drops upon the words "Continental Casualty Company." And this is what is said: —after citing the grading time and the meetings of the Defendant Macri and the Plaintiff—"out in the field on the project, all as

aforesaid; and that they”—apparently the “they” means Macris, so I will insert the word in my interpretation of the Complaint—“and that Macris were bonded by Continental Casualty Company with both performance and payment bonds,” and he “sought the services of the [22] Defendant McKelvy.”

Then in paragraph (e), in these particulars that are set out by way of which this injury and fraud was accomplished, “at all times from the date W. R. McKelvy, one of the partners in the said firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, was first retained until the ultimate termination of his contract of employment on or about the 20th day of October, 1945.” Now, he pleads a span of time from the date of his employment which, as your Honor has well pointed out, is not stated, “Until the 20th day of October, 1945.” He “Took no action whatsoever to terminate said contract, or bring suit against said Macris for the reasonable value.”

Then in paragraph (f) we have this language, about the middle of the paragraph, “Defendant McKelvy thereafter continued to delay the taking of any action whatsoever against the Defendants Macri and their bonding company as requested by Plaintiff,” the Plaintiff, “became concerned” with the Statute of Limitations.

Then in paragraph (g), it says, “on the 20th day of October, 1945,” the “Defendant McKelvy then informed the Plaintiff for the first time that he could not represent Plaintiff in any action

against [23] the Defendants Macri; that Macri Company was a good customer of Continental Casualty Company and that Continental Casualty Company was one of Defendant McKelvy's largest accounts." That is just a pleading, I take it, of the relationship existing between the Defendant McKelvy and Continental Casualty Company.

Paragraph (h). "Plaintiff thereupon retained the services of an attorney in Yakima, Washington, who promptly investigated the facts." He got an attorney in Yakima and the attorney made demand upon the Macris, the demand failing to produce results.

"That on or about the 14th day of December, said Defendants Macri filed a suit in the Circuit Court of the State of Oregon for the County of Multnomah." The Defendants Macri are not before your Honor today by any motion. But we did accept the pleading as a fact, filed the suit in the Circuit Court of the State of Oregon, the County of Multnomah, alleging damages which they had suffered by reason of Plaintiff's alleged breach.

In Paragraph (j). There is the allegation that this suit is in Multnomah County, Oregon, was malicious and wilful, without probable cause, and was [24] filed for the sole purpose and in fact had the effect of drying up Plaintiff's credit, causing him severe damage to his business in Portland, reducing him to such an impecunious financial condition as to make virtually impossible the filing of the threatened suit in Yakima.

There is no allegation at all that Mr. McKelvy

had any contact whatsoever with—had any legal relationship with the Macris. There is no allegation of any concerted action between Continental Casualty and Macris in Macris bringing their suit in Oregon. That suit was brought, I take it from reading the Complaint and using what ordinarily happens, Macris are under suit—claiming their damage by reason of an alleged fault.

Now, in paragraph (k) in this Bill of Particulars, that despite the filing of said suit in Multnomah County, Plaintiff did file—I don't know quite just what that means—but at any rate Plaintiff did file in Yakima, Washington, on or about the 20th day of December, 1945. The Plaintiff herein then appeared in said suit in Multnomah County, Oregon, and procured an order for the trial judge, dismissing said suit on condition Plaintiff file in Seattle, which Plaintiff did. [25]

“The trial Court in addition also advised the said Defendants”—the said defendants.

I think it is a reasonable inference that in this suit in Oregon that all of these parties were not Defendant; all of the Defendants in this case were not in that suit in Oregon. It was brought by Macris against the Plaintiff.

Then in paragraph (1). “After the filing of Plaintiffs' suit in Yakima, Washington, as aforesaid, against Defendants Macri and Defendant Continental Casualty Company.”

Now, there is where the Defendant Continental Casualty Company first apparently comes into this picture in litigation. There is no allegation of anything else.

This suit filed in Yakima was a suit against the prime contractor and against his bonding company, a perfectly regular, normal suit. This was filed in Yakima, and that for the first time brings in the Continental Casualty Company as a party to any litigation. That is revealed to us in the Complaint in this paragraph. Then it goes on to say that the Continental Casualty Company, then, apparently in the case, revealed the fact that there were the Clyde Philp and A. J. Goerig, other defendants in [26] this action, too, who were joint venturers with Macris. That may or may not have been known to the Plaintiff but, if it weren't known, a courtesy was performed and the complete revelation of the whole situation was there.

So the suit apparently proceeded, then, against all of the defendants including Philp and Goerig, joint adventurers with Macris. That would make the three Macris and Clyde Philp and A. J. Goerig joint adventurers covered by this bond. Your Honor can see there would be several questions which readily could rise.

The next place that Continental Casualty Company is mentioned is in the last part of (1):

“Plaintiff also discovered, after the conclusion of the above suit, that Willard E. Skeel of the law firm of Skeel, McKelvy, Henke, Evenson & Uhlmann, appeared as attorney of record for Defendant Continental Casualty Company on the first day of the trial of Plaintiff's said suit in Yakima, Washington.”

There is nothing pleaded, there, except that there were apparently two cases on trial that day. "And Plaintiff had no knowledge of said suit coming on for trial." It doesn't say that [27] he had any connection whatsoever with the matter or that he was interested in this suit in any way. The nature of that action is not revealed and, of course, there is nothing before us because there are no facts that make anything of that, and I assure your Honor there will be no facts to make anything of.

In paragraph (m) we have the word "Defendants" used at different times: "Full trial was had upon the merit of Plaintiff's Complaint, and of Defendants' Answer and Cross-Complaint."

The Court in Yakima found in favor of the Plaintiff who sued in quantum meruit and also entered a judgment in favor of the Defendants in the sum of \$1.00 as to the Defendant's Cross-Complaint. The Cross-Complaint was Macris' Cross-Complaint, transplanted from the Oregon Court into this case at Yakima.

The next statement is this: "In furtherance of Defendants' concerted plan, appeal was taken from said judgment first to the Circuit Court of Appeals and finally to the Supreme Court of the United States, said litigation not being concluded until on or about the 9th day of November, 1949."

Now, there is certainly no conspiracy in carrying on litigation in a legal proceeding before the Court to [28] try the issues that may be involved between all parties. You have got a lot of parties, here. You have got the Plaintiff. You have got the Defendant,

and the original Plaintiff in the Oregon case. You have got joint venturers in the picture, and you have got a bonding company. There are a lot of questions. That case went through the Circuit Court of Appeals and, as the Pleader says, finally it went to the Supreme Court of the United States. Then the draft was finally paid by Continental.

I am interested, also, in reading this Complaint, to read particularly again in this “(n)” —all of these matters are set out from “(a)” clear down through—“That the Defendants conspired in the following particulars.” Now, I still don’t see any overt act. I still don’t see any concerted action. The word concerted is used but where is the concert; where is the overt act; where is anything pleaded that says that these people did anything unlawful or did a lawful thing for an unlawful purpose or in an unlawful way?

In “(n)” again I am interested this way: “That all of the actions aforesaid were the result of concerted action by Defendants, and each of them,”—now, there comes a straight allegation by use of that [29] language, as far as Continental is concerned, and that is the first time and the only time, so far, that there has been a direct allegation as far as the Continental is concerned. But let’s follow, “concerted action by Defendants, and each of them, in that”—and then come his limitations or the outgrowth of it—“in that Defendant McKelvy accepted the employment by Plaintiff”—and that is where he pins his law suit.

“That all of the actions aforesaid were the result

of concerted action by Defendants, and each of them, in that Defendant McKelvy accepted the employment by Plaintiff, yet his entire action was detrimental and antagonistic to the interests of Plaintiff, and should never have been accepted by Defendant McKelvy because of conflicting interests of his former and then present client, the Defendant Continental Casualty Company, and further in that Defendant McKelvy at all times herein complained of was fully aware of Plaintiff's precarious financial condition, of all facts pertaining to Defendants Macris' default, having personally gone upon the project on one or [30] more occasions to observe for himself the defaults complained of; and having worked in close harmony with the attorney for the three Macris said attorney having formerly been associated in the same office with McKelvy."

Well, if your Honor please, I do just feel like appealing a bit to your Honor's knowledge of what the Court can take judicial notice of. As firms are organized and as they work these days, there are a good many people that have been in my firm that have come and gone, and gone into business for themselves, and they are out.

There is no allegation, here, that that attorney had anything whatsoever to do with the firm of Skeel and McKelvy's office at the time. There is merely a statement that he had formerly been connected with the same office as McKelvy is connected with. There is not a single thing, there, that on a single statement in that paragraph when, after saying that all of the actions aforesaid were the

result of concerted action which the Defendants and each of them, and then details it. Now, he is bound by the detail, as far as this pleading is concerned. We are here on this pleading. I recognize that the Plaintiff is here representing himself, but [31] I don't think that changes the rule of the pleading. I don't think that changes the position that a person is in. He certainly has the right—and that is his Constitutional right—to appear and present his action. But it still must be pleaded within the rules of the Court.

Now, then, let us look at the next one. Now, he talks about the damages, and your Honor has—I see readily your Honor has very well in mind the law with respect to conspiracy. We all know that there is no magic about a conspiracy. It is simply this: That the parties get together, agree upon a program, there is an overt act to carry it out and the act of one of those groups—one of the group, then, makes it the act of all. There is no place, all the way through here—and I have tried to pick up Continental Casualty every place the eye falls on it—that the Continental Casualty Company did anything except in this one little allegation in the end where it says—I have it underscored, here, and call it to your Honor's attention—being the only time that it comes right down and says, “And each of them” in the 9th line on the page. Then he goes ahead, however, and eliminates them because he says, “In that” and then the whole Complaint is that the [32] Defendant McKelvy accepted employment when he shouldn't have accepted employment.

In (o) he goes ahead with damage. "That the damages hereinafter complained of were the direct and proximate result of the breach of the attorney-client contract of employment between Plaintiff and Defendant McKelvy, in that said Defendant McKelvy failed to advise Plaintiff that he represented Continental Casualty Company, which had or might have a conflicting interest, and by not performing the services which he undertook and agreed to perform . . ."

Your Honor has properly said that a contract, if breached, in connection with a concerted plan, a concerted program—I can conceive of this, that a group of people would get together, a group of business men might get together and one business man might say, "I have got an agreement that I am going to supply a certain amount of material to Mr. A. and Mr. A. has a contract that he has to carry out from Mr. B. and Mr. A. doesn't wish to do so." So he gets the supplier to breach the contract to furnish the material to him so that he is excused under the clause of causes beyond his control, and so the [33] material isn't furnished and the contract doesn't go ahead and damage results. I see that. That isn't this case at all.

This case says that the damages complained of were the direct and proximate result of the breach of the attorney-client contract of employment between the Plaintiff and Defendant McKelvy in that Defendant McKelvy failed to advise that he represented Continental Casualty Company, had some representation of them.

Now, even if there be a concerted plan, it takes an overt act to set it in motion. If there are no damages as a result of it, there is still no cause of action.

Mr. McKelvy is the one complained of. The Plaintiff says, in his complaint, that he became a little disturbed because of the possible running of the Statute of Limitations, so he got another attorney to look into it who immediately did look into it, who brought the action, who succeeded in the action, who recovered for him; and the fact that McKelvy didn't reveal his connection with Continental Casualty Company, the bonding company, does not in any way change the right of Macris or anybody else to carry on litigation and, had McKelvy brought the action, [34] there is no allegation that there would not have been appeals by Macris, who had no connection whatsoever with McKelvy. So the only damage that he alleges is this—because McKelvy didn't bring the action; somebody else brought the action. And litigation ran along. But there is nothing, there in this Complaint, that says that had McKelvy brought this action by some magic Macris would not have prosecuted this action.

And, of course, the bonding company could not in the course of litigation step out and say, "Well, Mr. Plaintiff, we are going to hand you this money that you ask for." They could not breach any contract which they had with their prime contractor. They could only run along with Macris until Macris and the Plaintiff had settled the litigation. And

when that litigation was at an end, with them named as a party, then they paid. Where is there anything, if your Honor please, that even makes a conspiracy; where is there anything in this Complaint that sets out a conspiracy? If we were to pick it out and just name it one, two, three, these folks got together at a certain time and did so and so and agreed upon a certain program; it isn't there. Where is the overt act that sets it in motion? The only overt act that [35] appears is that McKelvy didn't tell, didn't reveal. Now, under certain circumstances maybe, that the imagination might carry one to, that the failure to reveal something might be the very thing that would be desired to set in motion a conspiracy. It isn't so plead.

And then, besides, no damage resulted from that because he got an attorney in plenty of time; the attorney brought the action and was successful. And the bonding company paid when the two chief parties to the litigation had determined their differences, Complaint and Cross-Complaint—fault here and alleged fault there. When that was done, the bonding company paid.

If your Honor please, I don't see where there is anything in this Complaint that can possibly hold Continental Casualty Company as a party to this action, regardless of what the parties did, because they had nothing whatsoever to do except to follow along in this determination. They did not take over defense. There is no such allegation as that. This case is a matter of record. It is in the records of this Court. They did not take over

Macris' defense. Macris appeared and were defended and the parties were before the Court; and the Defendants Macri and Macri [36] and Goerig and Philp had their viewpoint as to whether they owed this money, and they had a right to litigate. Not until that was litigated and that right was determined in the Plaintiff to receive the money did the Continental have anything to do.

So, if your Honor please, I most respectfully do request your Honor to pass on the Complaint as is. I think we have a right in a conspiracy matter—it is just one of those cases, as your Honor well knows—it brings somebody into somebody else's quarrel so easily by alleging a conspiracy, that he concerted with them, but I think that action has to be shown.

The Court: Are you also raising the question of the Statute of Limitations?

Mr. Croson: Yes, the Statute of Limitations, if your Honor please.

The Court: And upon the authorities cited to me?

Mr. Croson: That authority will cover the same case. We have the same thing in ours, too, your Honor.

As far as the Statute of Limitations is concerned, inasmuch as it is the McKelvy action, that that came to an end when the employment ceased and unless there was something that these parties [37] concerted in, agreed upon prior to McKelvy's severance from the situation, there is no conspiracy that ever got as far as an overt act. I will go along

with your Honor on this—if three people got together and agreed upon a program and conspired to it, and then somebody dropped out, and then there is an overt act carrying out that agreement which they made, the man that drops out isn't relieved of the burden; no, I will follow that. But here is the point: There is no overt act that these parties, while they were associated—even though they were associated together—giving a broad inference to the Complaint——

The Court: You say that because there is no definite allegation as to what the conspiracy was?

Mr. Croson: No. And no definite allegation of the result that was done as a result of any agreement between these parties. I just don't see it, if your Honor please.

(Short recess.)

The Court: I will listen to Plaintiff, now.

Mr. Schaefer: Your Honor, I would ask whether I may be privileged to have my say from this table rather than in front because of the papers that I have spread out before me. [38]

The Court: Very well.

Mr. Schaefer: I am a layman. I am a concrete contractor. I haven't been able to secure an attorney to represent me in this cause. The attorney I had in the Yakima case has and did have information of the defaults throughout the job; the defaults of Mr. McKelvy in representing me and in the way that he left me set, and other things as the case came along.

At the time that we went to the Circuit Court of Appeals at San Francisco, I procured another attorney in Portland to work out matters with my attorney at Yakima and prepare for the appeal, and he also was fully informed of all the wrongs that I claim that Mr. McKelvy was the fault of happening. But after or during the course of our conversations, Mr. Olson, my attorney at Yakima, said, "Well, let's get on with this suit. We will get this suit out of the way, first, and then we will look into other matters."

After we were paid—that was in October or November of 1949—at that time, my nerves were pretty well frayed and I took a vacation. So I talked to my attorney, then, Mr. Hile, in Portland, and advised him to get things ready, that I wanted [39] him to—as soon as I got back from my vacation—file this suit which would probably be in the middle of March.

I thought he was preparing the materials for this suit. Shortly after I came back in March, this gentleman here, Pat Darcy—he was my superintendent on this job out here at Yakima—which by the way is not a dam job; it is an irrigation job. His mother-in-law had been housekeeper for an old attorney in Portland, and he passed away, so she had him help her to move certain stuff. The home I believe was left to her. And among the materials were some law books which, when I returned, Pat had down at my office in an orange crate. I asked where the books came from and he said where they came from, and he says, "I will turn them over to

you; I have no use for them." So it was from that time, or about at that time, that I started to prepare, after I became aware that progress wasn't being made by Mr. Hile toward filing the suit, and I started delving through the books, myself, and underscored much of the material in those books and had the estimator in my office and his wife type up this material. From it, I decided as to what kind of a case it really should be. [40]

As I say, I am not an attorney, and I know what they say about even an attorney representing himself in a Court case. But I feel there was so much wrong done in this thing that I owe it to myself and my conscience, and I owe it to other contractors that might meet up with the same situation, to just clear a thing like this up.

I have thought of not doing it, and I just wasn't able to sleep.

You might think I should have been more fully aware and progressed with the preparation of such a suit sooner than I did, but I had an attorney and I figured that——

The Court: I anticipate what you are telling me, now, is an explanation as to why you haven't filed the suit sooner in so far as that bears upon the Statute of Limitations.

Mr. Schaefer: That is right.

The Court: Mr. Schaefer, the legislature of the State has made the law. And this being a diversity case, this Court is obliged to follow the rule in the State of Washington.

Counsel has cited to me the section of the Statute

and also a decision which counsel informed me holds that the period of the Statute of Limitations in [41] a conspiracy case is two years. You have heard me make the statement to them that, as I understood the law, that the two years started from the last overt act of the conspirators in futherance of the agreement of conspiracy.

Assuming that you have alleged a conspiracy, here, when is the last overt act of that conspiracy as it appears in your Complaint?

Mr. Schaefer: May I make a statement before I go into that?

The Court: Of course, I am precluded from going into the background of matters that may appear in this record. We are not trying the case, now. All we are trying is whether your pleading is sufficient as a matter of law.

Mr. Schaefer: I want to state, here, I understand from Section 155 of Remington's Revised Statutes that where an objection is made, based on the Statute of Limitations, objection that the action was not commenced within the time limit can only be taken by Answer or Demurrer, if the Court sees fit to sustain this matter on a question of the Statute of Limitations.

I would like to ask the privilege of a 30-day time limit for the purpose of filing an [42] amended Complaint because I believe I can file the Complaint in accordance with the facts which is not barred by the Statute of Limitations.

The Court: The substantive law of the State in this Court and, if the two-year limit applies, that

governs me. But the procedure law is governed by the Federal Rules of Procedure. Under the Federal Rules of Procedure, the Statute of Limitations may be raised by a motion to dismiss as counsel have raised it in this case. So what you read, there, would have no application at all in this Court.

Mr. Schaefer: In a fraud case, I understand that in 159, paragraph 4 of Remington, that it is three years.

The Court: Aren't you attempting to allege, here, in this Complaint, a conspiracy, that these several defendants conspired and entered into an agreement to commit a wrong upon you?

Mr. Schaefer: Yes, I am.

The Court: If it is a conspiracy case, then I would suggest that you look into the very question I have been presenting to you, namely, does not the 2-years Statute of Limitations apply? They have cited one Federal case interpreting, as I understand the [43] the Washington Statute, and which they represent to me holds that the 2-year Statute of Limitations applies in a conspiracy case?

Mr. Schaefer: I have the analysis—or the statements here—and then an analysis.

The Court: Let me make this suggestion to you, Mr. Schaefer? Apparently from what you say; your reply or lack of reply that there is no allegation in this pleading of an overt act or anything done in furtherance of the conspiracy within the 2-year period immediately preceding the filing of this Complaint, and that the 2-year period of Limitations applies, the Motion to Dismiss as to each of these moving defendants would be good.

In granting the Motion, I would also grant you time within which to file an amended Complaint, if you can, setting forth and overcoming this question of the plea of the Statute of Limitations. If you did that, you should go into your Complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these Defendants agree to do—and then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the [44] damages with connection between the act done or the acts done and the damage.

You see, in your Complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable. It would have to be concerted action pursuant to an unlawful conspiracy against you.

Mr. Schaefer: Mr. McKelvy had the information of when the contracts were signed. I will go through the dates at which various contracts——

The Court: Well, I am only interested in the dates as you allege them, here. I have made a notation of those. As I pointed out to opposing counsel, you don't allege the date that you retained Mr. McKelvy.

Mr. Schaefer: The date that I retained Mr. McKelvy was——

The Court: Now, you are going outside of this record. I am just trying to point out to you troubles that you have in this pleading. Now, you allege there was a delay but you don't allege how [45] long the delay was. That won't appear unless you allege when you retained Mr. McKelvy. You do allege when you discharged him.

Mr. Schaefer: He let himself out. If I may, I had a conversation with Mr. McKelvy. He came to my office on August 16th last.

The Court: Then you should allege what he agreed to do for you. Did he agree to represent you in litigation or did he agree to try to get a settlement for you or investigate it? What did he agree to do?

Mr. Schaefer: He agreed to do those things necessary.

The Court: Then you should allege that. You see, you haven't alleged what he agreed to do.

Mr. Schaefer: Your Honor, I am not an attorney and I haven't been able to get one. I have contacted the President of the Bar Association, here; I talked to the Assistant Attorney General down here at Olympia. I have tried in just every way. The attorneys—as with Mr. Olson, he said, “I think you have a good case but if you are going to name Mr. McKelvy, I can't interest myself in this thing,” and he just stepped out of it. He said, “Can't you file this action and leave him out and he can be subpoenaed?” [46] And I said, “Why

should I?" He is the one that did me the greatest wrong; he knew of these things; and as a result of his not taking those actions which I know that he knew of and in his own office memo, a memorandum made up in his office, there is proof of his knowing that I had a good right to get out of that or to quit that contract, and he did nothing about it. So I said, "He is the greatest wrongdoer. Why should I not name him just because he is an attorney?"

The Court: I try to surmise what could be the damage you sustained from this. You allege, however, after you state Mr. McKelvy refused to go ahead and represent you in the litigation, that you obtained some other lawyer. You allege, therein, that you were successful and that you obtained judgment for what was granted or asked for in that action. I assume from that you obtained the damages that——

Mr. Schaefer: No, your Honor, I obtained the cost of the job, itself.

The Court: In other words, you were recompensed fully for any fault or breach by these Macri brothers of your contract?

Mr. Schaefer: No, your Honor. I was only [47] recompensed for the cost of doing the physical work on the job. My cost in the prosecution of this first cause, there, is over \$44,000 that I did not get anything for.

The Court: All of those matters were in issue in that case, were they not?

Mr. Schaefer: No.

The Court: Well, they should have been.

Mr. Schaefer: They couldn't be, your Honor, for the reason, here, that the bonding company in the first instance is only liable for the materials and the labor that goes directly into the construction. I was informed by Mr. McKelvy that Macri had his assets hidden. I was informed or we didn't know until after the suit was filed in Yakima that Philp and Goerig were silent partners. In there we found that they had a termination agreement which took place after I had a couple of meetings in the field with Mr. Macri about his breaches of his contract.

The Court: Well, taking this Complaint—and that is all I can take in ruling upon these motions—you allege that you brought suit against Macris and were successful and that you collected the judgment therein. Of course, there is no allegation there of any loss by you of anything that Macri might [48] have done or not have done—any breach by him of the attorney-client relationship with you. If there was any damage sustained by you in addition to that, there should be appropriate allegations. As far as the allegations are concerned, it appears to me that no damage was concerned—merely from the delay in bringing that suit; and that you had full recovery from any loss you sustained in your relations with the Macri people.

Mr. Schaefer: I would like to read this.

The Court: Now, again, you are going to take me into evidence, things which may be brought out in the trial of the case. They are not pertinent here.

Mr. Schaefer: In other words, he came down there to get some money on the account—on his account—and while he was there, we had conversation for an hour and five minutes and during the course of that conversation he asked me three times about paying him some even small amount so he could clear his books on it. He came down a few days after a letter from Olson went out to Holman's office stating the reason why we would—why he would not release the cost bond that Macri had put up in filing in the Circuit Court of Appeals. So from that it appears [49] to me that the information from the Holman office went to McKelvy; and subsequent to this and on account of that a few days later McKelvy came down to my office and I believe that would indicate very clearly that if I had paid him any money on it, at all, I could not have brought him into this action.

While he was at my office, he pulled his handkerchief out of his pocket and wiped his brow. He put his handkerchief back in his pocket and then he brought it out again a third time. Then he wiped his brow three times before putting it back in, and then he put it back in once more. So he was sweating about something. I imagine if I had paid him any money on it——

The Court: The fault of your argument, in which you advance evidenciary matters to me, is a fault I find in your Complaint. There is so much evidence you put in this. You shouldn't allege evidence. You should allege what we call the ultimate fact; namely, these parties agreed in some form, alleging how they did it, and that they did these

things to injure and harass yourself, and then that they did certain things in furtherance to carry out the unlawful agreement and combination. You haven't alleged those clearly. You allege a lot of [50] evidenciary fact that may come into the trial of the case. In some instances you don't even allege they were done in furtherance of any conspiracy. The main fault is that you haven't alleged unequivocally a conspiracy or agreement between the parties.

Mr. Schaefer: I had given McKelvy all of the dates and the wrongs, that is the breach of the contract by Macri which it has been proven that it was wilful and negligent, as Judge Driver decided it, and that such breach started from the beginning of the contract to the completion by us of that portion of the job, and those breaches were then in existence.

When I talked to McKelvy about it, he said, "Well, I don't know; we can't really—the bonding company won't have to—it would be pretty hard to have the bonding company pay on this." He told me that, as far as Macri having to pay, it would be this is in the contract and that is out of the contract.

I told Mr. McKelvy about two meetings that we had in the field wherein Mr. Macri had promised to pay the additional costs of any work that we were to do and I argued that with him and I told him we didn't have the organization to do this additional work and for him to go ahead and see that he got his [51] work done according to the contract.

So all such information was given Mr. McKelvy. We had a meeting in Holman's office in which Mr. Holman, the attorney for Macri, admitted that if the excavations were being paid for according to the specifications, and that Macri was making his excavations as I stated, that we would then have a good, legitimate claim against Sam Macri Company. That information and other was information that McKelvy could have had. He could have had the information that Philp and Goerig were silent partners and that Philp was the attorney, in fact, for Continental Casualty Company; and then, later, a few days later, became a party to this contract. He could have had the information through the bonding company, surely, that they tried to get out of the silent partnership arrangement with a termination agreement; and in this termination agreement they did get out of the obligation as to us. That is at the time that I was pushing McKelvy, all along, to get a suit filed. I told him when I went in there, I said, "They have breached this contract thus and so and I want to terminate it. I can't carry on." I told him all of the facts about my financial condition and how the job was progressing and at what time I was supposed to be through with the [52] job which was never denied. I was supposed to have been able to complete that job by September 15th, not only that but a second job. The second job they did not start until about 10 months after they were supposed to have started the job; and on this second contract the Macris and also on the first within 30 days after signing the contract

they were supposed to commence work. On the second contract they did not commence work for about 10 months, and yet they filed a suit.

If McKelvy had done—which his office memo indicates as to the information that I had given him—and had he done what he, himself, admits that I had a good cause of action here in quantum meruit and that perhaps the best thing for me to do was to quit work; had he done that, then I would have been able to stop work, there, and have gotten into the suit, if necessary, and gotten paid for my work and gone on with my other work. But instead of that, and through his negligence in doing so, from November 1, 1944, to the time on October 20, 1945, he just alibied me along, so to say, and told me that I would have to complete the job and if I didn't Macri could go in and complete the work and send his bill to my bonding company, and my bonding company would wipe me out. [53]

Had he, though, gone ahead and completed that, all of this other difficulty would not have arisen. And after the Macri Company—after we had threatened the filing at the conclusion of the job, after we were through with the job which we finished up in April, I think, the 8th, of '45, after that time—let's see, I am losing the thread, here—after that time Mr. McKelvy advised me to turn over my assets and everything of value, over to my brother Bill or someone that I could trust, and told me of how he had handled the case for another contractor in which a bank lost \$83,000 and the contractor still operated. At that time, I told him that the road

ahead of me was maybe narrow and long and rough as hell—that is quoting from our conversation—but that that was the only road I was traveling.

He had told me, then, he said, “In that way you will get rid of your obligation with Uncle Sam, with the Internal Revenue Department and all other old accounts.” I told him no, I wasn’t doing anything of the kind.

Then later I had a meeting with Mr. McKelvy at his office for 11:30, I believe it was, and we didn’t do any more than shake hands and bid the time of day when he told me that he had a luncheon speaking [54] engagement. So we left the office and the arrangement was that we were going to be back at 1:15. I was back a little before that and the office girl asked me whether I was to see Mr. McKelvy and I said, “Yes.” And she said, “Well, he isn’t going to be back any more today.” And I said, “Yes. He was to be back at 1:15; that was our agreement when we left for lunch.” Along about 1:20 or 1:25 she said, again, “I don’t think he is going to be back. I am quite sure he went out to his new home.” I said, “What is the telephone number?” And she said, “I don’t know; no, he doesn’t have a telephone number out there, yet.” I asked what the address was and she said she didn’t know. I asked whether anyone else in the office knew the address and she said, “No, I am sure that no one does.” So I waited there until 3:30 and then went home. And then just a couple of days after that I again had an appointment with Mr. McKelvy. And at that time I was shoving to get this

suit filed. Then Mr. McKelvy first informed me—he informed me, then, that he couldn't represent me any further; that Continental Casualty Company was one of their largest accounts and that Macri Company was one of Continental Casualty's good customers.

I asked him, “Well, what limit have I got? [55] By what time must I have a suit filed?” And he said, “Well, you still have about a month.” Then I felt more like doing something else, I will assure you, but I asked him whether he knew of some good attorney, then, in Yakima, so he named, I believe, four of them. And the third man that he named was Mr. Olson. So a friend of mine that had been Vice President of the Northwest Title Company at Spokane, he had—during the course of this job there in about July of '44—heard that I was having difficulty and that Macri was going to bring someone from down in his home town; in other words, Mr. Walker had given a foreman for one of the construction companies, there, in Yakima, a ride into town or out toward his home and it was evident that Mr. Walker wasn't too well acquainted with the addresses, I guess, and Walker told him he had come up from Portland——

The Court: Well, Mr. Schaefer, I am going to have to stop you. I know you are not a lawyer, but you are going into matters that are outside of anything that I can consider. I have tried to tell you that evidenciary matters are not before me. There is just the question of pleading before me. If you have got something to tell me or present to me [56]

in reply to the arguments made by counsel for the defendants, I will listen to you, but I can't listen to this evidenciary matter that you are telling me. Your principle grievance seems to be against Mr. McKelvy. If it were alone as against him, as far as your Complaint is concerned, the breach of his contract with you occurred in 1945—I think you said in October or November.

Mr. Schaefer: But all of these other things flowed from——

The Court: Now, just a minute. If that is the sole basis of your cause of action against McKelvy, the Statute would have clearly run against that. If you are keeping him in through a conspiracy, as I say, you must allege plainly and unequivocally what that agreement was and that it antedated any of these acts that you speak of. Then you must allege that these acts were in furtherance of that conspiracy. You must allege, as I say, what the conspiracy was—what did these people agree to do? Those allegations must be sufficient to show what they agreed to do as to an unlawful act or to accomplish a lawful act through unlawful means. You haven't done that.

As far as the Statute of Limitations is [57] concerned in connection with the conspiracy, I again state to you that the statute, as I understand the law, runs from the last overt act done in furtherance of the conspiracy and in carrying out the agreement between the parties. You can allege in an amended pleading an overt act done within the period of limitation and that, of course, would

overcome the vulnerability which is present in your pleading.

I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as 30 days?

Mr. Schaefer: If you please, your Honor.

The Court: I will permit you to have 30 days within which to file an amended Complaint.

Now, counsel has mentioned to me the rule which requires a non-resident—it is a local rule pertaining to this District—which requires a non-resident to post a bond in the sum of not less than \$250. You have not done that, and you could not maintain the suit without complying with that rule. Counsel has suggested and requested the Court to make the bond in a sum in excess of \$250, having in mind [58] that the rule places in the Court the discretion as to the amount of the bond, the minimum being \$250.

What reasons have you to give me that \$250 would not cover the costs?

Mrs. Curry: There are two appearances, those of the Macris and Philp and Goerig, and I don't think \$250 would cover all of our costs. I suggested that it should be \$500. There is no more difficulty in posting the \$500 but it gives us more security, that is all.

The Court: You see, non-resident litigants, under the rule, are in an unfavorable position. A resident litigant would not be required to post that

bond but a non-resident litigant is required to do it. You being a resident of Oregon come within the definition of the non-resident litigant.

Mr. Schaefer: That is a local rule, here?

The Court: It is a local rule, yes.

Mr. Schaefer: At that time, in Yakima, I don't think we had to. I was unable to make bond with the bonding companies in the past; and to post a certified check would be proper, would it? I don't know that a bonding company would post a bond for me in this.

The Court: I have no authority to dispense [59] with it. The rule is there and I must require that it be complied with.

Mrs. Curry: I think, your Honor, he could file a certified check payable to the Clerk.

Mr. Schaefer: Why I bring that up is because——

Mrs. Curry: It would be satisfactory to us. All we want is our security, that is all.

Mr. Schaefer: We were trying to secure a bond for bidding on some other work, down there, and I was informed by the insurance company or my bondsman that I couldn't secure a bond as long as I was involved in litigation with any bonding company.

The Court: In that rule is there anything to the effect that the Court may increase the amount of the bond?

Mrs. Curry: Yes. The Court may require an additional.

The Court: An additional bond?

Mrs. Curry: Yes. But I think we can only make it when one bond is filed. I don't think we can come in continuously.

The Court: Well, I am going to order that he comply with this Rule 50 and file a bond in the sum of \$250. If this rule says that a bond in the sum of \$250, no approval therefor is necessary. After the [60] bond has been filed, any opposing party may raise objections to its form or to the sufficiency of the surety for determination by the Clerk.

So the order of the Court will be that the Plaintiff file within 15 days a bond in the sum of \$250. The two motions which have been presented to me are and each of them is granted. The Plaintiff may have 30 days within which to file an amended Complaint.

Mrs. Curry: Your Honor, may I address the Court? It has been rather hard for me to listen to certain statements made outside of the record with reference to Mr. McKelvy. I would just like to make this statement or put it in the form of a question and ask Mr. Schaefer if he did not come into our office at the behest of his own bonding company on an entirely different matter?

The Court: I think that request of yours is inappropriate.

(Concluded.)

(At 11:52 o'clock a.m., Thursday, January 11, 1951, proceedings in re Motions concluded in the United States District Court.)

[Endorsed]: Filed April 16, 1951. [61]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-partners Doing Business as MACRI
COMPANY, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it rembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; The Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant, Continental Casualty Company, a corporation, ap-

pearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had:

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness.

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying is the same bank all the time, your Honor, Seattle First National Bank.

(Testimony of A. J. Goerig.)

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

No. 13129

United States
Court of Appeals
for the Ninth Circuit.

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 267 to 654)

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

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A. J. GOERIG

recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy

(Testimony of A. J. Goerig.)

of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig and Philp, and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement

(Testimony of A. J. Goerig.)

which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and that he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plain-

(Testimony of A. J. Goerig.)

tiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

(Testimony of A. J. Goerig.)

Q. Did you have anything to do with these jobs?

A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No.

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where did you and Mr. Philp main-

(Testimony of A. J. Goerig.)

tain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off of Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen, laborers, or otherwise on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

(Testimony of A. J. Goerig.)

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond obligation for the performance of those jobs, to be signed by Macri and Company?

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it.

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

(Testimony of A. J. Goerig.)

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on

February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

SETTING OF MOTION TO DISMISS

Before: The Honorable John C. Bowen,
District Judge.

April 9, 1951, 10:00 a.m.

The Court: The next case on the calendar is the Schaefer case. Will counsel and Mr. Schaefer come to the counsel table? The Court will discuss the matter of a future hearing on this. I will not be able to hear it myself.

Mrs. Curry: Your Honor, may I make a statement?

The Court: You may.

Mrs. Curry: The purpose of our motion and notice was just that, was a motion to set the motion to dismiss. Inadvertently the notice brought on the original motion, and I would like to correct our notice to read "Motion to set the motion to dismiss."

The Court: Let the record show that the notice is so amended.

Mrs. Curry: All that we want, and I believe other counsel also, is to get the motion set.

The Court: I do not believe Judge Hall will have an opportunity to hear the question, because Judge Hall has to take over the Tacoma calendar, and it leaves more Court work than I can do here.

It is possible that there might be a time when Judge Driver while he is here might hear these motions. Judge Driver will be here next week. Is there any reason why this matter should not be on his calendar next week, subject to other matters which he himself may have already set on Monday?

Mrs. Curry: May I ask the Court, does that mean that the motion to dismiss will be set down for hearing?

The Court: Everything that is pending in the way of a legal question will be before Judge Driver.

Mrs. Curry: I would like the motion before the Court today disposed of by setting down the motion to dismiss, your Honor. This motion of ours and of other counsel to this amended complaint has been on file since February 16, and we have been diligent in trying to get a hearing for it. I realize what the calendar is so far as the Court is concerned, but I would like to have our motion to dismiss and the alternative motion to strike set down for hearing on a day certain.

The Court: Is there any objection, Mr. Schaefer, to setting this before Judge Driver next Monday, a week from today?

Mr. Schaefer: No, there is not, your Honor.

The Court: Every motion now pending and every legal question which may properly then be pending are set down in this case, and all matters in this case are transferred to Judge Driver's Court which he will be holding here beginning next Monday, at 10:00 o'clock in the forenoon.

I happen to know that Judge Driver intends to hear a habeas corpus matter, or some questions pending in connection with a habeas corpus proceeding, which he originally commenced to hear in the Eastern District, but which subsequent questions have been set down for hearing before him while he is attending in Seattle in order to better accommodate all of the parties and their counsel interested in the proceedings. Doubtless those will be heard first. I do not know how long they will take. I think he had the impression that it would not take long to hear those, but he may have a different impression today. The one I refer to was a few days ago, when he was talking over the telephone about it.

This case and all of the questions and the entire case is transferred before Judge Driver for his consideration and attention, and I ask counsel to appear before Judge Driver next Monday, at 10:00 o'clock in the forenoon in this building at some courtroom which will then be assigned to Judge Driver.

Mr. Egan: May I address the Court, your Honor, regarding a clerical error on my motion? I represent defendants Macri, and when I handed the

pleadings to the young lady so she could get the heading, I notice she headed it "Motion of Continental Casualty Company." The body of it is correct, but I am speaking of the title.

Actually, it is the motion of Sam, Don and Joe Macri, and so that Mr. Schaefer will not be laboring under any misapprehension, nor the Court either, I would like at this time to have the clerical error corrected. It appears on my motion, your Honor, that is all.

The Court: Will counsel stay together and go to the Clerk's office and by interlineation make whatever amendments or corrections they wish to? Mr. Schaefer, will you go with them and be present when that is done so that you will know what is done.

[Endorsed]: Filed April 23, 1951.

[Title of District Court and Cause.]

RECORD OF PROCEEDINGS AT HEARING
ON MOTIONS TO DISMISS AND ALTER-
NATIVE MOTIONS TO STRIKE

Be It Remembered that the above-entitled cause came on before the Honorable Sam M. Driver, United States District Judge, on Monday, April 16, 1951, at Seattle, Washington, the plaintiff appearing in his own proper person, without counsel, the defendants Macri appearing by Granville Egan, attorney at law of Seattle, Washington; the defendant, W. R. McKelvy, appearing by A. P. Curry, of

Skeel, McKelvy, Henke, Evenson & Uhlmann, attorneys at law of Seattle, Washington; the defendant Continental Casualty Company, a corporation, appearing [1*] by Carl E. Croson and Willard Hatch, attorneys at law of Seattle, Washington; the defendants Goerig and Philp not appearing, either personally or by counsel, whereupon the following proceedings were had and done, to wit:

The Court: Has the Continental Casualty Company been dismissed out of this suit?

Mrs. Curry: No one has been dismissed. The order of dismissal was entered, but the plaintiff was permitted the right to amend the complaint. The order of dismissal was entered for all of us.

The Court: Was that for all of them?

Mrs. Curry: Yes.

Mr. Egan: The defendants Macri, when we presented our demurrer the other two had been dismissed, and Mr. Schaefer asked if our demurrer would not be argued, because he was going to file an amended complaint anyhow, and he asked if we would just pass our argument, which we did.

The Court: Oh, I see, the motion was granted, but the plaintiff was given leave to amend, and now the question is on motion for dismissal of the amended complaint, and motion to strike, too, I think.

Mrs. Curry: In the alternative, yes. I represent Mr. McKelvy, Mr. Croson represents the Continental Casualty, and Mr. Egan the Macris. I don't believe Goerig and Philp have appeared. [2]

The Court: There's no one representing them,

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

then, and Mr. Schaefer is appearing for himself?

Mr. Schaefer: That's right, your Honor.

The Court: All right.

Mrs. Curry: Mr. Schaefer filed a complaint that was some eight pages long and attempted to allege a conspiracy against all of the defendants. At that time we made a motion to dismiss, and the matter was assigned to Judge Lemmon, and Mr. Schaefer was given thirty days to file an amended complaint, and he filed one ninety-two pages long, which has taken me an awful long time to read, let alone anything else. I don't think that there's a single thing in the complaint that wasn't alleged in the original complaint. He has alleged a lot of material, hearsay, not even evidence.

The Court: A considerable portion of it is setting out documents in prior court proceedings.

Mrs. Curry: Everything, but one thing is certain, his whole case is before the court right now so we can have a final determination at this time. First I would address myself to the allegations of the complaint. As I say, actually there's nothing in this complaint that wasn't alleged in the other complaint.

The Court: It's been my view that where this so-called "notice pleading," the short skimpy complaint that may be resorted to under the rules of civil procedure, where that's [3] employed you should be very liberal and not grant a motion to dismiss if it's possible to spell out a cause of action within the general framework of the complaint. You think this is not a notice pleading?

Mrs. Curry: This is not a notice pleading; this is a story-book, but be that as it may, our motion to dismiss was on the grounds it did not state a claim; whatever claim he had against McKelvy is barred by the statute of limitations, and that it was redundant, but I'm not addressing myself principally to redundancy, because I want an order of dismissal.

The Court: I think consideration should be given to the fact that the plaintiff is not an attorney, and he is appearing, as he has a right to do, in his own behalf, and while of course we can't lay aside all the rules in a case of this sort, we should take it into consideration.

Mrs. Curry: But on the other hand, there is some limit to this consideration, and it's a terrible burden on the rest of us. Three parties have had three sets of attorneys up here, and of course in our case we get no fee for it, but be that as it may it has been a very burdensome undertaking, and I don't think there is anything that can avail the plaintiff for all of this effort, but now taking the complaint as to the allegations, the first eleven pages of this complaint tells the story that between December 7, 1943, and December 31, 1944, he got two contracts—— [4]

The Court: What were those dates?

Mrs. Curry: December 7, 1943, and December 31, 1944, a little over a year. Your Honor, I will recall this case to you. The case that this is based upon was tried before your Honor in Yakima.

The Court: I remember it very well.

Mrs. Curry: In that year Macris got a contract for the Roza project, and the plaintiff signed two subcontracts with the Macris for excavation and concrete work, and during that period he got into a row with them about what they were to do and what he was to do, and there were two meetings had on the field, and he made notes of those meetings, and he alleges that he later gave Mr. McKelvy those notes, and what was said by Mr. Macri and what he said and what his contention is. That is all that is alleged in those eleven pages, and then the only allegation of conspiracy in that is on page 5, line 27, where he alleges that the defendants Macri, and defendants Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, the defendant, Philp, were attempting from the beginning of said subcontract to bankrupt Plaintiff, ruin his reputation and credit by not paying Plaintiff as per contract requirements, by not performing their part of the work. That's the only thing that is pertinent to this lawsuit in those eleven pages. On page 11, I believe, he alleges on November 1, 1944—— [5]

The Court: I saw that conspiracy allegation; where is that?

Mrs. Curry: Page 5, line 27. It's no conspiracy; they were going to do these things, but that's the nearest thing he has in all those eleven pages. Now, on page 11, line 25, he alleges that he employed McKelvy; "That said conspiracy was joined by defendant, McKelvy, on 11/1/44 and furthered by him as more fully appears from the following facts:"

That's the first time we really have an allegation of conspiracy. Now, after that he alleges that his own bonding company, which was Glens Falls, and which, by the way, was a client of ours suggested that he go up to our office and particularly to see McKelvy, and then he employed McKelvy to file a quantum meruit suit, he alleges that on page 12, and then again the only other statement that has any pertinency to this lawsuit is line 28, "Plaintiff informed Defendant, McKelvy, that the Macris were bonded by Continental Casualty Company with both performance and payment bonds" and before that he alleges he employed McKelvy and told him about his subcontracts, and then he says all that he told McKelvy, and he reiterates everything he said before in the complaint, the first eleven pages.

He says that he told McKelvy all of those things that he alleged in the first part, and he sets out in detail letters of the Reclamation Service, not to McKelvy, and pertaining to his contract or to the contract, and then he alleges on page [6] 15 that McKelvy told him "he did not think it would be necessary to bring suit since Macris' attorney, Mr. Holman, had been in their office for a number of years and that although Mr. Holman was now associated with another office, they were still cooperating as if he were still with their office; that they were just like that," whatever that meant; and then he sets out beginning on page 16 the advice he got from Mr. Skeel and McKelvy. That is in the preliminary matter before they had gone over

the matter very thoroughly, more or less the general contract.

Then he sets out on pages 16 to 20 those memos that he had referred to, your Honor, of the field meetings between himself and Macri, and four pages of that, it's all set out, the notes he took down and he said he gave to McKelvy, and he sets that out, then on page 20 he said McKelvy said he would study the matter, and then he sets out a photostatic copy of a memorandum, it's in the usual form that our office communications are, to Mr. Kelley, and Mr. Kelley was an employee of the firm just like I am at the present time, and McKelvy's thought was simply to look this thing up, that this man seemed to have some troubles, and see what his rights were, and what could be done, and the little pencil memo on that is in Kelley's handwriting, so it's evidently his memo; and then on page 22 he said that the Macris sued him, charged him with default, wrote him a letter and charged him with default, and [7] actually that's what he came into our office about, was this thing Macri was accusing him of, and then there was a meeting in Holman's office, and Holman confirmed some opinion he had about the payments on the job, and that meeting was in January, 1945, and he sets out a letter which he says nobody sent and nobody got, but apparently was addressed to the Macris, but was evidently a proposed letter that McKelvy proposed to send, but he says that the recipients said they didn't get it, and that he is advised it never was sent.

Then on page 25 he refers to a newspaper clipping about some one of the Macri boys being charged with a forgery, about which I know nothing, and then he says on October 15, 1945, that McKelvy told him to hide his assets, which Mr. McKelvy denies absolutely; anyway, we were representing Glens Falls; if we had done that we would have been defeating our own purpose or defeating the interest of our client, Glens Falls Indemnity Company.

Then he says he had what he calls a run-around there, getting appointments from Mr. McKelvy, and that Mr. McKelvy made an appointment and didn't keep it, which occurred apparently October 15 to 20; anyway, on October 20, 1945, McKelvey told him he could not represent him in a suit against Macris, because Macris were bonded by Continental Casualty Company, and they were old, old clients of the office.

The Court: What was that last date? [8]

Mrs. Curry: October 20, 1945; and then he alleges that he hired Olson, who was one of the attorneys we had recommended to him, and he brought the suit, or somebody brought the suit in Oregon which was dismissed, I guess Macris brought that suit which was dismissed, and that original complaint is all set out on pages 28 to 33 of this complaint, and then he alleges that on December 20, 1945, after we were out of this case, and on page 33 of the complaint, he alleges he brought the suit in Yakima, and on page 34 is the first statement again of any conspiracy. Oh, there's one more thing; on

page 28 he says that on December 12, 1945, that was after we were out of it, because that was October 20, 1945, on that date the defendants, Macris, Continental Casualty Company (through its agents Philp & McKelvy and defendants Philp & McKelvy personally)—now, if he means McKelvy there, there isn't anything to tie that name in, and I believe he means Philp and Goerig.

The Court: What page was that?

Mrs. Curry: Page 28, because there's no allegation of agency, and there was an allegation of agency to the bond, Philp and Goerig had a joint venture agreement with the Macris and they signed as attorneys in fact the Continental bond, but McKelvy wasn't involved in that, and so when he says "through its agent Philp and McKelvy" I'm inclined to think he means Philp and Goerig, because that is the name of the co-venturers. [9] They were a partnership, but anyway that's there.

Then the next allegation of conspiracy is on page 34, and he alleges at line 23 "After filing of Plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by defendants, Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:" and then he sets forth all the details of that litigation and the appeal. From page 26 to page 67 is all the Yakima proceedings.

The Court: Where does that start?

Mrs. Curry: 26 to 67. Even your opinion is set forth there, and I'm rather interested that you said

it was a hard case, and on page 51, quoting you, "Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company" so it would indicate that the Continental and the Macris and everybody else had some grounds for their defense, and it would not support that allegation that there was a conspiracy to delay by appealing and so forth, but anyway, from 26 to 67, in there someplace he makes an allegation that our office represented Continental in that lawsuit, and that has me quite [10] disturbed, because all the proceedings—you see, he sets forth all the complaints and the answers and the opinions, and everything shows that other counsel represented Continental Casualty Company, but what happened was that there was, if you recall, five use suits under the Miller Act, suits brought against the Macris and Continental Casualty Company. The only question in those lawsuits, as I recall, is whether or not the bond covered the amount, and the testimony of Philp and Goerig was used in all five cases and by a stipulation used in this lawsuit, but we didn't represent Philp and Goerig. In those five use cases Willard Skeel was representing Continental Casualty Company. Mr. Schaefer was not a party to those cases, but for convenience these parties in this lawsuit stipulated to use that testimony of Philp and Goerig, and that only pertained to their joint

adventure with the Macris and had nothing to do with Schaefer and our office, or anything else pertaining to the lawsuit.

The Court: I don't suppose I can take judicial notice as visiting judge here what happened in another lawsuit in the Eastern District of Washington.

Mrs. Curry: Your Honor, you don't have to; it's all alleged in the complaint.

The Court: I do distinctly remember that Mr. Ivy, the Yakima attorney, was the one who did all the talking for the Continental anyway in that case, and there were a number of [11] days of trial and argument and so on, but I remember there was that situation, there were other suits in which the Continental Casualty Company was involved.

Mrs. Curry: I was concerned on that; that statement is I think on page 36, yes, on line 13, February 21, 1947, which, your Honor, is true of the use suits; that's the time Willard Skeel appeared, 250, 251, 255, 257, 267, but the allegation is, "Willard E. Skeel of Skeel, McKelvy and so forth, represented Continental Casualty Company in said lawsuit in Yakima, Washington, copy of the hearing this date is recorded in the transcript" and that part of the transcript is that portion of the use cases that was used in Schaefer's case, but we had nothing to do with it on anything else.

Then, your Honor, to correct your statement, I believe you can take judicial notice of it; I have a case, Inland Fruit Company vs. Red Cross Line, 5 F. 2d 218, which held the Federal court takes

judicial notice of any reported decision, and in doing so may examine the records, and in this case it was appealed from your court to the Ninth Circuit Court, so it's a reported decision, and in doing so you can take judicial notice of all the records in it.

Now then, down to 67. 67 to 85 is all of the appeal, including the copy of the reported decision. On 85, line 26, we have another statement of conspiracy; except for one thing on page 46, the only way you could tie McKelvy in would [12] be on line 5 and 6——

The Court: What is this action for, damages?

Mrs. Curry: He's asking a million dollars from Mr. McKelvy and the rest of them.

The Court: I know, but it's for damages for conspiracy to injure him in his business?

Mrs. Curry: I don't know; I'm just telling you what's in the complaint, that's all I can do.

The Court: I wondered, though, if you're arguing the statute of limitations, if it's your position that the statute would have run against the acts of these defendants unless there was a continuing conspiracy?

Mrs. Curry: It would run against McKelvy, at any rate.

The Court: What would be the applicable statute?

Mrs. Curry: Two years, and that is cited, your Honor, in that case Mitchell vs. Greenough, 100 F. 2d 184, I think it was Judge Schwollenbach's decision, Remington's Revised Statutes 165, a two

year statute, otherwise it would be three years for tort or fraud or contract.

The Court: I think Mr. Mitchell alleged a conspiracy, didn't he?

Mrs. Curry: Yes.

The Court: I may have been in that suit; I was in one of them for a million dollars. I considered it quite a compliment. [13]

Mrs. Curry: Maybe Mr. McKelvy will feel this is a compliment after he gets over being annoyed by it. There's a statement there about the defendants, and I suppose that would include McKelvy. He says March 21, 1947, this is the date on which the court rendered an opinion in the trial on plaintiff's complaint and defendants' answer, which ultimately resulted in judgment in the trial court in favor of the plaintiff—you gave him some \$57,000, if I recall—and against the defendants, of plaintiff's suit for quantum meruit. Now, Mr. McKelvy was not a party in that suit, and our office was not an attorney of record, so that word defendant can't possibly refer to us, but it is there.

Now, on page 85, as I say, all of this from 67, when he took his appeal, to 86 is all about the appeal to the Circuit Court. The record he sets out there shows that our office had no connection with it, but on 85, line 26, he said that they presented him a draft, and it had three words in the draft that he didn't like, and he had to argue for a couple of hours to get those words deleted from this draft. Continental, of course, paid the judgment, but we weren't there, and he sets those out, and then he

says on line 26: "The above three underlined words were used in furtherance of defendants' concerted plan, and would have deprived plaintiff of his right to maintain this suit." Those three words, being on the back of the draft, read: "The sum of \$66,306.48 in full payment [14] and satisfaction of Judgment, interest, costs and so forth." Now, he insisted on the deletion of those words "interest, costs and so forth" and he alleges their insertion was a concerted plan to deprive him——

The Court: What was it appeared on the draft?

Mrs. Curry: It read: "Received of Continental Casualty Company the sum of \$66,306.48 in full payment and satisfaction of judgment, interest, costs, etc., in cause entitled United States for the use of M. C. Schaefer" and so forth and so on, and he had objected to the use of the words "interest, costs, etc.," and makes the allegation on line 26 that the above three underlined words were used in furtherance of defendants' concerted plan, and would have deprived plaintiff of his right to maintain this suit. I'm just picking out the possible allegations of conspiracy. Then on page 87 he alleges that McKelvy stopped in to see him August 16, 1950, and asked him to pay a bill, and McKelvy admitted the bill was outlawed, and he told McKelvy so and so, and McKelvy said so and so, and that goes on for practically the rest of the complaint, except he said McKelvy said: "We're honest, we've been in business since the turn of the century," and he says that wasn't true, because it just appeared in the newspaper Mr. Skeel had

founded the firm in 1917, and I think the court can take judicial notice that our firm preceded the entrance of Mr. Skeel in it, it was then Roberts and Wilson. [15]

The Court: Before that it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel and Whitney's office from June to December, 1916, the year I graduated from law school.

Mrs. Curry: Well, I worked there twenty-five years ago, and went back. Then there is nothing more alleged in that complaint, and he asks for a million dollars. In the original complaint he asked for two million. Now, Judge Lemmon, we had a transcript made of the proceedings that were had on the original complaint, and, your Honor, there's 61 pages of transcript for that alone.

The Court: There seems to be a transcript of a hearing before Judge Bowen here, too.

The Clerk: Yes, there was a brief hearing before Judge Bowen.

Mrs. Curry: Yes, but Judge Bowen said he was sick. I guess we started our preliminary statement, Judge Bowen said he didn't feel well, and he transferred it to Judge Lemmon.

The Court: Is the transcript before Judge Lemmon in here?

The Clerk: I don't think it's been filed, your Honor.

Mrs. Curry: But I have it, and I'd like to read

from it what Judge Lemmon said. He was most patient with this man, and he advised him, gave him the best course on conspiracy [16] that any freshman in law school could possibly have, and he hasn't done anything Judge Lemmon told him to do except to write a longer complaint. Judge Lemmon did not advise that. Beginning on page 45 he said this: "You see, in your complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable. It would have to be concerted action pursuant to an unlawful conspiracy against you."

Then on page 46: "Then you should allege that. You see, you haven't alleged what he agreed to do." Then he says: "I try to surmise what could be the damage you sustained from this. You allege, however, after you state Mr. McKelvy refused to go ahead and represent you in the litigation, that you obtained some other lawyer. You allege, therein, that you were successful and that you obtained judgment for what was granted or asked for in that action. I assume from that you obtained the damages that—Mr. Schaefer: No, your Honor, I obtained the cost of the job, itself. The Court: In other words, you were recompensed fully for any fault or breach by these Macri brothers of your contract? Mr. Schaefer: No, your Honor. I

was only recompensed for the cost of doing the physical work on the job.” [17]

Then the Court goes on: “Well, taking this complaint—and that is all I can take in ruling upon these motions—you allege that you brought suit against Macris and were successful and that you collected the judgment therein. Of course, there is no allegation there of any loss by you of anything that Macri might have done or not have done—any breach by him of the attorney-client relationship with you. If there was any damage sustained by you in addition to that, there should be appropriate allegations. As far as the allegations are concerned, it appears to me that no damage was concerned merely from the delay in bringing that suit; and that you had full recovery from any loss you sustained in your relations with the Macri people.

“The fault of your argument, in which you advance evidentiary matters to me, is a fault I find in your complaint. There is so much evidence you put in this. You shouldn’t allege evidence. You should allege what we call the ultimate fact; namely, these parties agreed in some form, alleging how they did it, and that they did these things to injure and harass yourself, and then that they did certain things in furtherance to carry out the unlawful agreement and combination. You haven’t alleged those clearly. You allege a lot of evidentiary fact that may come into the trial of the case. In some instances you don’t even allege they were done in furtherance of any conspiracy. The main

fault is that you [18] haven't alleged unequivocally a conspiracy or agreement between the parties.

"Well, Mr. Schaefer, I am going to have to stop you. I know you are not a lawyer, but you are going into matters that are outside of anything that I can consider. I have tried to tell you that evidentiary matters are not before me. There is just the question of pleading before me. If you have got something to tell me or present to me in reply to the arguments made by counsel for the defendants, I will listen to you, but I can't listen to this evidentiary matter that you are telling me. Your principal grievance seems to be against Mr. McKelvy. If it were alone as against him, as far as your complaint is concerned, the breach of his contract with you occurred in 1945—I think you said in October or November. * * * Now, just a minute. If that is the sole basis of your cause of action against McKelvy, the statute would have clearly run against that. If you are keeping him in through a conspiracy, as I say, you must allege plainly and unequivocally what that agreement was and that it antedated any of these acts that you speak of. Then you must allege that these acts were in furtherance of that conspiracy. You must allege, as I say, what the conspiracy was—what did these people agree to do? Those allegations must be sufficient to show what they agreed to do as to an unlawful act or to accomplish a lawful act through unlawful means. You haven't [19] done that. As far as the statute of limitations is concerned in connection with the conspiracy, I again state to you

that the statute, as I understand the law, runs from the last overt act done in furtherance of the conspiracy and in carrying out the agreement between the parties. You can allege in an amended pleading an overt act done within the period of limitation and that, of course, would overcome the vulnerability which is present in your pleading. I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as 30 days?"

Then he set the bond. I went through and made a little memorandum of authorities I had cited in the previous proceeding, and the first of those is that in a conspiracy the statute 165 Remington's Revised Statutes applies, according to Mitchell vs. Greenough, and if not, it would be 159, which is the three-year statute applying to fraud and contract, but there is no action; I cited particularly three cases that came up in this jurisdiction because I thought this was going to appear originally before Judge Bowen, and I don't think that there is any case that states the law more simply and completely than Judge Neterer's decision in the Ransom case. Edith Ransom was an actress, and she had appeared in a movie and attained some notoriety, and gotten herself some job in [20] Honolulu as a hostess and I guess caused some trouble there, and she alleges she was shanghaied out of Honolulu and up to Yokohama and across the Pacific and taken and put in an insane ward, and that this was a con-

spiracy of the two steamship lines and individuals and everybody concerned, 1 F. Supp. 244. Judge Neterer was very patient with her and explained to her if she had any cause of action it would be of libel against one of the defendants and assault against the others, but that the combination of all those did not make a conspiracy. The other Ransom case was 2 F. Supp. 409.

They are based upon a case that was tried with good counsel on both sides, Puget Sound Power and Light vs. Asia, 2 F. 2d 491, which alleged a conspiracy, I guess against their franchise here, but it was a conspiracy by these parties by bringing lawsuits, and in the Asia case they said that a person imagining or fancying a remedy had a right to the court, and I said at that time and I say it now, the defendant fancying a defense has a right to defend an lawsuit, and in this case the Continental would have a right to defend it, and certainly McKelvy wasn't to blame because they did defend the lawsuit in Yakima, but in the Ransom case Judge Neterer said that each of these actions of committing a tort would not cause a conspiracy; that conspiracy looks to the future, not to the past; it's a stranger to what has happened; there has to be a concerted action for the future, and it's [21] doing an unlawful thing, or doing a lawful thing unlawfully, and then that brings me to the next part of this——

The Court: By the way, did you give me the citation of this Judge Neterer case?

Mrs. Curry: Yes, Ransom vs. Matson Naviga-

tion, 1 F. Supp. 244; Ransom vs. Dollar Steamship Company, 2 F. Supp. 409, and then Puget Sound Power and Light Company vs. Asia, 2 F. 2d 491. I've cited another case there because it speaks of a concert of action in commission of an unlawful act, or that a complaint must allege a concert of action in commission of the unlawful act, or facts from which there is a natural inference of an unlawful overt act through a common design, and that was so well expressed that I used the case, *Calcutt vs. Gerig*, 271 F. 220.

Now, there is no damage alleged in this case. You have to tie your damages in and show from the facts of the case that they were the natural consequence of an overt act. There's no overt act so far as the defendant McKelvy is concerned alleged, but if there was, there is no damage, because just saying you're damaged—he doesn't say how he was damaged or that any of these acts caused any damage to him; then I have set forth the authority that you can make a motion to dismiss because of violation of rule 8a, of not stating facts concisely. One of those cases was a *per se* case, and the court said that much is a hodgepodge of material and [22] immaterial, relevant and irrelevant, which is not admissible even as evidence, and I think that certainly hits the nail on the head here, but I haven't found anything alleged that's relevant with the possible exception he said he employed McKelvy on November 1, 1944, and on October 20, 1945, McKelvy told him he couldn't

sue the Macris because they were bonded by the Continental Casualty Company.

If there is any further authority needed I have several memorandum of authorities in the file, your Honor.

The Court: The Court will take a five-minute recess.

(Short recess.)

Mrs. Curry: Your Honor, as long as I quoted from this transcript I'd like to offer it.

The Court: All right.

Mr. Croson: May it please your Honor, I am Carl Croson, as I said this morning, appearing for the Continental Casualty Company, and I would like to introduce to your Honor my associate who is here with me, Mr. Willard Hatch of our office.

If your Honor please, your Honor will find in the record our motion to dismiss or in the alternative a motion to strike. We assign our statement of reasons in support of our motion. These are set forth clearly in the record, and I'll briefly call them to your attention. The citations upon which we rely follow after each suggestion, so I think that your [23] Honor will have no difficulty in following them, therefore I am not going to quote except from very few cases.

The Court: I think I saw that in here. I didn't have time to look up the citations.

Mr. Croson: If your Honor please, then, I'm going to try to direct myself very bluntly to what I consider the questions in issue. Naturally we

can't do this in a moment, with 92 pages to cover, and I'll be as short as I possibly can. Let us have this clearly in mind—I know it's redundant, almost, and unnecessary to say it to your Honor, but your Honor hears a great many cases and a great many sets of facts, but just to get this clearly in mind, as I tried to last night, I'd like to review the fundamentals. A motion to dismiss should be sustained where averments of the complaint show that the plaintiff cannot state a cause of action upon which he may recover.

I'd like to keep that in mind, because if your Honor please, we were before the court for some time on the original complaint, and I think when your Honor reads the exhibit that has just been filed before your Honor, you will see there never was a plaintiff more courteously treated or given more specific instructions as to what to do in order to be in court with a complaint that would state a cause of action.

The second thing to keep in mind is that conspiracy itself, as Mrs. Curry has said, does not give rise to a cause of [24] action. A conspiracy is only that thing which binds the parties together and brings them together, making one responsible for the overt act of another. It takes the overt act as well as the conspiracy or the agreement. Now, in order to have this conspiracy there must be a preconceived plan. Notice that the courts all say a preconceived plan. As Mrs. Curry has well said, it does not relate back; it is a preconceived plan; the very start of a conspiracy is an agreement en-

tered into by the parties. I have cited a number of cases in connection with that point, which appear in our memorandum.

The next thing is that the minds of the conspirators must meet understanding, so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offenses charged. It's not just enough to get together and talk loosely about the matter. There must be a determined and an agreed and an understanding, deliberate agreement to do the acts and to commit the offense.

The mere knowledge—this is one of the points for us to keep in mind—that the mere knowledge, acquaintance or even the approval of an act without cooperation or agreement to cooperate is insufficient to hold any party in a conspiracy combination. That is not sufficient, if one knows what the other may be doing. It is essential to create a civil liability for conspiracy that there has been an overt act by one or more of the conspirators pursuant to the scheme and in [25] furtherance of the object. There must some place be that scheme and that objective.

The complaint alleging tortious acts which were committed at a time clearly within the bar of the statute of limitations was subject to dismissal notwithstanding an averment that the conspiracy was continuing, because it is the act done under that agreement that is the thing that sets the whole matter in motion. There is nothing set in motion, regardless of an agreement, regardless of an understanding, regardless of a meeting of the minds,

there is nothing sets that in motion until there is the overt act done in pursuance of that specific scheme and agreement.

The Court: Is it your position, then, suppose that a conspiracy were alleged here and it was alleged that certain overt acts were done which would give rise to the cause of action up to say 1946, then the mere fact that the conspiracy continued, but no further overt acts were done, that would be the basis of a cause of action, is it your position that the statute would run in that case?

Mr. Croson: Yes, your Honor, from the overt act. It takes something to set it in motion. I think that's clearly the law in the matter, and I also concur in this, that the two-year statute is the applicable statute. It is not specifically mentioned in the three-year statute or in the two-year statute, but then we have a catch-all that says anything not [26] mentioned in the rest of them belongs in the two-year statute; but even in the three-year statute we'll show your Honor that this falls, even within the three-year statute.

We have cited the same case Mrs. Curry has quoted, 100 F. 2d 184, that's section 165 of Remington's Revised Statutes, and even if section 159 is the applicable statute, it would be, if this is a fraud case, if your Honor should determine this is an action resting against Mr. McKelvy for failing to do something he had assumed to do, an obligation he had assumed to do, the three-year statute would still be applicable. The case Mrs. Curry cited

with respect to damages, Moffett vs. Commerce Trust Company, the court says there that a conspiracy action is in tort.

The objection that the complaint is verbose and redundant in violation of rule 8 and 12 of the Federal Rules of Civil Practice is properly taken by a motion to either dismiss or to strike, so we put in the alternative motion to dismiss or strike. All of these matters, if your Honor please, are supported by the statement of authorities which we have given your Honor.

I don't know of any better way to help your Honor, and I wish to be helpful, than to just call your Honor's attention to where the Continental Casualty comes into this picture and into this complaint. The Continental Casualty, of course, is the ordinary bonding company. Here was a contract entered [27] into between Macri and the government through the Bureau of Reclamation, then along comes the letting of this subcontract. The subcontract is let to the plaintiff here. The plaintiff then has his cause of action against Macris, against the principal contractor. The Continental Casualty Company being the bond, and being a bonding company in the ordinary sense and the ordinary conditions in this case as well as thousands of others, finds itself drawn into a suit between Macri and Schaefer because of the fact that it has given that bond. Now, being drawn into that suit it is its right, of course, to defend, and to defend in all legitimate ways.

The first place that there is mention, and I have

marked these in two ways, if your Honor please, and I think you'll find that everything I am telling your Honor is checked in our memo which follows, I'll explain it a little more fully than it is there, but I call it again to your Honor's attention, just the page where you will find the references to Continental. I have done that simply to assist your Honor as you might review it.

On page 1 in paragraph 3 there is this statement: "That during all the times herein complained of, beginning on 3/2/44 and ending on 8/18/50, plaintiff suffered substantial damages, hereinafter more fully alleged, as the sole and proximate result of the overt acts (hereinafter alleged in detail) of defendants who did wrongfully and maliciously conspire, [28] combine and confederate together with wilful and malicious intent to injure, defraud and damage plaintiff." He says defendants, so I have marked that because we are named as defendants. However, that allegation is not sufficient to comply with any of the authorities given or any good rule of pleading. It may be a preliminary paragraph, but there must be alleged and set out clearly the agreement made between the parties. You can't just say there was a conspiracy; that's nothing but a conclusion, so what we are looking for is the same thing we looked for in the original complaint, what is the agreement, where is the meeting of the minds as to these parties defendant as to what they were going to do and how they were going to do it, and what was the act that set

that in motion? Those were the things we're looking for in this complaint.

Then again on page 1, that Clyde Philp signed as attorney in fact for the Continental Casualty Company. On page 2 we have the performance bond, and the Continental Casualty of course is mentioned. We have the signature of the Continental Casualty. Page 4, we have the statement on number 3, plaintiff did not know of these facts until after suit was filed in Yakima, Washington, on or about 1-17-46. All of the matters up to this time, then, have been or were known to the plaintiff on or about 1-17-46, that's taking the extreme time. Whether the fact that there was or wasn't a bond, or who [29] signed the bond, those matters are all matters that a subcontractor generally looks into at the time he enters into a contract with a prime contractor, but let us assume that he didn't know; he had ways and means of knowing, and he should have known the bond that he had, that was up with the prime contractor to protect him.

Now, I find nothing then until we get over to page 6 of the amended complaint, and here he says at the very bottom of the page, if your Honor please, and that's listed under 12, 7-15-1944, it starts out: "This is the date on which it is alleged that an agreement terminating the joint venture between the Macris and the silent partners, Clyde Philp and A. J. Goerig, was signed. This termination agreement, of course, was effective as to the plaintiff but not effective as to the Continental Casualty Company." I mention that only because

that's another place the Continental Casualty Company is mentioned, but keep in mind now that that's the date in 1944 that the joint venture between the principal defendant, Macri, and the partners, Philp and Goerig, that that agreement was terminated, that joint venture agreement. In other words, Philp and Goerig operated for a time as contractors and came into this picture and then were out again on the 15th day of July, 1944.

Now, we pass on with a great deal of allegation as to the pleadings and so forth, but we come to the Continental [30] Casualty Company again on page 12, and that again, if your Honor please, is marked number 16 here, and 11-1-1944: "On or about this date plaintiff employed Mr. McKelvy to file a law suit in quantum meruit against the Macris and the Continental Casualty Company on job specification # 1062 Roze Project, Yakima, Washington, and to terminate the second subcontract on job specification # 1068 because of Macris breaches of said contract," and so forth. Again I call attention to that because it mentions the Continental Casualty Company, and that is the time that Mr. McKelvy was employed to start this suit, and he says in quantum meruit. I don't know where that phrase comes in in anything else, but it's here now, and it shows your Honor and shows me and everybody else, it's pleaded, that at that time he had had sufficient advice from counsel and help that he, a layman, knew a quantum meruit suit as against a damage suit. He says now in this complaint, I believe it was not so alleged in the former complaint,

but now he alleges that he employed McKelvy to bring this particular kind of a suit, which I say is very, very artful education as far as layman is concerned.

At the bottom of the page then, line 29, "Plaintiff informed defendant McKelvy that the Macris were bonded by Continental Casualty Company with both performance and payment bonds." Again Continental Casualty Company is mentioned. I am doing this with a definite purpose; as your Honor very [31] likely foresees, I want to show your Honor that there is not a single allegation that Continental Casualty Company ever entered into a scheme with anybody to defraud this man or in any way to harm or injure him or commit an overt act with that purpose in mind. My purpose is to show your Honor that there is nothing alleged here that would make the Continental Casualty a party to this suit as a conspirator scheming, planning and working out a program to be carried into effect by an overt act.

Then on page 14, line 22, we find this, which is a copy of a letter from the Bureau of Reclamation office at Yakima addressed to Continental, or rather addressed to the Macri Company, with copies to Continental Casualty Company and Concrete Construction Company. I think we are not concerned with that, it's surplusage, but again the Continental Casualty Company is mentioned as having got a copy of that letter from the Bureau of Reclamation.

Then on page 16 there is at the top of the page,

at line 3, that Mr. Skeel stated that he couldn't see how we could hold the Casualty Company. That was at the time that Mr. Schaefer was in Mr. Skeel's office, Mr. McKelvy being the man to whom he went primarily, Mr. Skeel, senior partner, being called in. So says the complaint. Again nothing that Continental Casualty has done.

We move on then in the complaint until we come to page [32] 22. Now, that refers now to a matter—number 18, it's the paragraph 18 on the left hand side. Now, I'm using the last three lines: "On this date there had not yet been any preparatory work done by the Macris and it was not possible for plaintiff's crew to do any work on this job. All the defendants herein knew these facts." I'm just bringing that in because it says "all the defendants." January 3, 1945, from the allegations, Macri had done no work on this job. That's not Continental Casualty's fault, nor is it alleged any place that Continental Casualty Company in any way told them to not go ahead and do the job, or to delay the work; it would have been clearly against the interests of Continental Casualty Company to have participated in that sort of a situation.

Now, 1-23-1945 there is an allegation of a meeting. This is interesting because of this fact; there is set forth now: "Mr. McKelvy and plaintiff met with Sam Macri and his attorney, Mr. Tom Holman, at Mr. Holman's office in Seattle." In other words, here was Macri and his attorney meeting with Mr. McKelvy and the plaintiff as they went over this matter. Then this ends, after discussing the differ-

ences between those two, McKelvy—I don't mean McKelvy—the Macris and the plaintiff. Then it says: “All the defendants herein knew these facts.” Now, those are mentioned, I have that marked in the blue, because it says “defendants” and they're only involved in general language and not specific. [33]

Now page 25, paragraph number 24, line 18, about the 15th of October, 1945: “As Mr. McKelvy and plaintiff were walking up the street in Seattle, Mr. McKelvy told plaintiff that plaintiff could not collect from Macris as the Macris had all their assets hidden, that the chances of holding Continental Casualty Company were very slim.” Now, that's the statement of the attorney to his client. The name is mentioned, therefore I call it to your Honor's attention, but nothing is said as to what Continental Casualty Company did or any scheme or plan laid out in which Continental Casualty Company was participating.

Then we move on to page 27, line 3: “Plaintiff at this meeting”—now, this was a meeting where there had been an alleged appointment with Mr. McKelvy, and when the plaintiff says that Mr. McKelvy failed to keep an appointment. Again nothing that the Continental had to do with it, but getting to line 3: “Plaintiff at this meeting insisted that defendant McKelvy state definitely the date that suit would be filed against the Continental Casualty Company and the Macris”; the name is mentioned, therefore it comes in, “and also asked defendant McKelvy how long plaintiff yet had in

which to bring suit. Defendant McKelvy then for the first time informed plaintiff that he could not represent plaintiff in any action against the defendants Macris and the Continental Casualty Company because Macri Company was a good customer of Continental [34] Casualty Company, who was one of defendant McKelvy's largest accounts, and that they handled nearly all of Continental Casualty Company's legal work in Washington." I read that whole paragraph because of the mention of the name Continental Casualty Company, but that simply discloses what any honorable attorney would do, that there was now a conflict of interest, and that they could not go ahead with the litigation.

Now, at the end of that particular section as they are numbered here, line 20: "That all the aforesaid acts by defendant McKelvy were in furtherance of the original conspiracy of defendants Macri and Philp and Goerig, and Continental Casualty Company through said defendant Philp and through its attorneys, Messrs. Skeel and McKelvy." Nothing at all there to bind Continental Casualty Company. Not a thing that Continental was doing. What was that original conspiracy? The pleader, if he were an attorney, I would say to your Honor that he had pleaded himself out at that point, because he says the original conspiracy when he has never alleged an original conspiracy, he has never alleged a scheme, he has never alleged a plan, he has never alleged any meeting of the minds, any concerted, planned program that they were going to work out;

the minds must work in concert with an understanding as to what will be done.

Then just so there will be no mistake about the work [35] involved, line 27—I'll read a little farther back—"On or about this date plaintiff employed Harry L. Olson of Yakima, Washington, as attorney to do the same things which defendant McKelvy previously had agreed to do, namely, file a law suit against the Macris and the Continental Casualty Company on job specifications # 1062 and # 1068 and to do all things necessary to protect plaintiff in all his rights." McKelvy is out, Olson is in, and Olson takes over on the date 10-22-1945, so the complaint alleges. Now a new attorney is on the job, a new attorney who is asked to do the same things which he asked McKelvy to do.

Now, taking the last paragraph on that page, "Plaintiff fully informed Olson of all things herebefore in this complaint set forth including all the details of the wrongs done to plaintiff by defendant McKelvy. Mr. Olson told plaintiff: 'Let's take one thing at a time.' " Now, apparently at that time, and I think we can read in this complaint very clearly, plaintiff says he fully informed Olson of all things herebefore in this complaint set forth, including all the details of the wrongs done to plaintiff by defendant McKelvy. He must have told Olson of all the things he complained about McKelvy. If there were any conspiracy he must have told what that conspiracy was. If there was any scheme he must have revealed what that scheme was. If there was any overt act to set it in motion

he must have told him what that was. He said he told [36] him all the details, and Olson told him to take one thing at a time.

Now, the next full paragraph on page 28: "On this date the defendants Macris, Continental Casualty Company (through its agents Philp & McKelvy and defendants Philp & McKelvy, personally), in furtherance of their malicious concerted conspiracy, filed a malicious suit in the Circuit Court of the State of Oregon for the County of Multnomah." Then he sets out the case there. It's Sam, Joe and Don Macri, copartners, plaintiffs, against Mr. Schaefer. Now, the sum and substance of that action is an action in the state of Oregon on an alleged claim of Macris against the subcontractor for not having fulfilled his contract. Reading the entire pleadings throughout your Honor will see that this is the culmination of the plaintiff's differences with Macri, in which Macri was—in which Schaefer was complaining Macri wasn't doing his work, therefore he was delaying Schaefer in doing his, and then Macri coming back and telling Schaefer that he wasn't accomplishing his. It was a case of "You're not doing yours" and then the reverse, "You're not doing yours" but the interesting thing of that is here is a case of Macris against Schaefer, and it's an Oregon case, and notice the attorneys as they appear on page 33, the attorneys are the same attorneys that Macri had all the way through this matter, Tom W. Holman, whom your Honor likely remembers, Maguire, Shields & Morrison, [37] a Portland firm, are listed there as the attorneys.

Now, I wanted to make one remark about the fact that everything was told on the 22nd day of October, 1945, everything was told to Olson that I'm putting my finger on that as a time when everything was known to the plaintiff, and whenever it was revealed by the plaintiff to a competent attorney, as being the date upon which if there were anything, the statute would start to run.

Now, on page 34 we have a letter set out which comes from the government telling the plaintiff how to proceed and what to follow on with. Line 13 it says "The Macri Company was bonded by the Continental Casualty Company." Nothing done by Continental Casualty Company, and 17th of January, 1946, "After filing of plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by defendants Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:" and then reading on, "When Continental Casualty Company then saw that plaintiff's suit was not filed in damages as they had anticipated plaintiff would file (If plaintiff had filed in damages Continental Casualty Company could not have been held liable) but instead suit was filed in Quantum Meruit, and then Continental Casualty Company became concerned and anxious to have some solvent defendants added to the case. They then, for the first time, [38] brought to plaintiff's attention the fact that there should also be named as additional parties defendant in plaintiff's said suit a partnership com-

posed of Clyde Philp and A. J. Goerig. Continental Casualty Company also secretly gave the following information to plaintiff's attorney, said information contained in a letter dated January 17, 1946, received from Harry L. Olson, plaintiff's attorney in the Yakima suit."

In other words, the Continental Casualty Company revealed, apparently, that Clyde Philp and A. J. Goerig were a copartnership and had had some connection with the matter, but even at that date this arrangement had been cancelled, but the Continental Casualty Company was making full disclosure. Of course, there's a different motive ascribed to the revealing of the matter.

Bottom of the page: "See copy of agreement terminating joint venture hereinabove under date of 7-15-1944. Plaintiff also discovered for the first time during the course of the trial of said suit in Yakima, Washington, that defendant Clyde Philp not only was a silent partner in the joint venture with defendants Macris and Goerig, but also had signed as attorney in fact for Continental Casualty Company the bonds posted by defendants Macris." That first time I spoke of the bonds was when I made the comment that it was an open matter, open to him as well as anyone else.

The next time the Continental is mentioned is page 37, [39] and I want to call your attention again to a confusion. May I ask your Honor to turn back to page 36; you'll find there "In the District Court of the United States" and so forth, "No. 246." Now, keep that in mind a moment, and we turn then

over to page 37, and we find this was before your Honor, and the plaintiff not appearing, the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington.” This was a hearing in 246, and in a matter, as I understand it, where there was a small amount of testimony, but in which the testimony of Mr. Goerig and Mr. Philp was taken and then by stipulation it was agreed that it might apply to all actions, and this is action 250 we’re talking about, it was 250 before your Honor, so that Willard Skeel appeared in an entirely different situation, because in your Honor’s case as we will see just a little bit later here, Mr. Ivy appeared all the way through, and Mr. Hutcheson. Mr. Hutcheson later carried the matter to the Supreme Court. We move on then, this is a lot of controversy that occurred between the attorneys, and then there is the certificate by the official court reporter, and we carried on through then [40] to page 51. We had a report now all the way through there without the Continental Casualty being mentioned at all; all the way through it is this litigation and the dispute between Macri and Schaefer.

Then we come to this last paragraph, these are your Honor’s remarks: “Now, coming to the law

applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration." Now, page 53, without reading all of your Honor's remarks, the bonding company is mentioned, and I call that again to your Honor's attention: "I think under the decisions of the state court that Mr. Olson cited here and were cited in his brief, that the sub-contractor is entitled to recover on that basis against the bonding company also." Now, that was on the basis, "Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work."

Your Honor will recall the case very clearly, of course, [41] but there was that line of divergence which is a question as to whether it is the fair and reasonable value of the work, where there is a failure of performance, or whether it is a matter of damage, and your Honor took the view, stating very frankly the difference of opinion and citing the case that had been cited to your Honor—I'm not quarreling with the decision, your Honor knows, I'm simply pointing out this, that when this case was

before your Honor it was then a case where there was some question.

Now, the bonding company is mentioned there. Your Honor says on page 56, line 3 "It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court." In other words, this is a matter that the court had to determine.

Now, again, page 58, your Honor still giving your Honor's opinion, I won't say opinion, either, it is a statement in which you invited counsel to state their differences, if any, "As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and [42] if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important." Cited only for the purpose of showing the nature of the case as your Honor reviewed it at the time.

On page 62, beginning at line 4, your Honor still speaking: "I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, gave rise to a situation where Mr. Schaefer was entitled to compensation for the fair and rea-

sonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time" and so forth. Now we go ahead to the next page and we find there the title of the case again, civil action 246, and again of course Continental Casualty Company's name appears as one of the defendants. Then if there's any question as to who appears for the Continental Casualty Company and who handled that litigation, page 63, line 17, there the judgment recites "the Continental Casualty Company appearing by its attorney, Eugene D. Ivy." On the next page, 64, we have at line 7: "It is further ordered, adjudged and decreed that the defendant, Continental Casualty Company, an Indiana corporation, have and recover [43] judgment against the defendants, Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97" and so forth.

Then on the next page, 65, we have a motion for a new trial filed by Continental Casualty Company; copy of the motion is recorded, referring to pages 115 and 116 of the transcript. That's the motion for the new trial. The Continental Casualty Company's name of course appears there because it was the one appealing. On page 66 one of the statements is "That the court erred in entering judgment against the defendant, Continental Casualty

Company, for any sum in excess of \$2656.46.” Then we have on the next page, 67, 5-20-1947, the date Continental Casualty Company filed notice of appeal. Goerig and Philp filed notice of appeal on the 29th day of July. Macris filed on the 18th day of August, and Continental Casualty Company filed its supersedeas bond on the 26th day of May. In other words, the Continental Casualty Company was the first to make its appeal, on the 20th day of May, 1947, and of course the question was the question which your Honor has said a number of times in your statement was a close question and a close case.

Going then to page 74 is the next time that Continental Casualty Company is mentioned. There we find the appeal to the Court of Appeals, on line 7, Continental Casualty Company, a corporation, vs. M. C. Schaefer, et al, United States Court of [44] Appeals for the Ninth Circuit, Excerpt from proceedings of Tuesday, October 19, 1948, before: Denman, Chief Judge, and Healy and Bone, Circuit Judges.” This was the order of submission, and Mr. Hutcheson appears for the appellant Continental Casualty Company, Mr. Holman appears for Macri and Company, and Stuart W. Hill and Harry L. Olson, counsel for appellee Schaefer.

Now, the opinion that was written, in the middle of page 75, line 18: “Continental’s appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract.” In other words, they

raise the point directly that was a point in issue in the case as it was tried before your Honor. Page 77: "On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel that the reasons underlying the doctrine of *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, are applicable here, where the issue does not involve construction or application of a federal statute."

Now, dropping to line 21, the next paragraph: "On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal [45] statute, the Miller Act, under which it was created." And so they accept jurisdiction of the case as being a case that involves the construction of the Miller Act with respect to the payment bond. Then there are the proceedings set forth, a number of pages, until we come to page 85. Line 1: "5-14-49 Continental Casualty Company filed their petition for writ of certiorari in the Supreme Court of the United States." "10-10-1949 Continental Casualty Company's petition for rehearing on the order denying their petition for certiorari was denied." "11-4-1949 Plaintiff accepted Continental Casualty Company's draft in payment of the judgment on job specification #1062."

That brings us to the payment. If your Honor please, all the way through Macri Brothers was carrying forward litigation contending for the posi-

tion which Macri Brothers had taken from the start, under the direction of their attorney, Tom W. Holman, plus their Portland attorneys. Now, all the way through that litigation it is our contention that your Honor can't find a conspiracy statement in there, nor can you find an overt act done in furtherance of any conspiracy to deprive anyone of his rights. A month before the statute would run under the Miller Act Mr. McKelvy told the plaintiff he could not prosecute the suit, gave him the name of an attorney, he went to the attorney, the attorney prosecuted the suit, carried forth the questions of the different viewpoints, [46] prevailed in the suit, received a judgment, and then the judgment was paid.

Where was the damage? I think your Honor gave, I know your Honor thought you did give the plaintiff every dollar that he was entitled to, and that judgment then, entered after the trial of the case which your Honor very frankly stated was a close case, that payment of that judgment gave the plaintiff all that he was entitled to. Suppose there had been a conspiracy? Suppose there had been an overt act? What could your Honor give to this plaintiff? One million dollars, as is requested here, without any statement as to what the damage was, how he was damaged? And then the last statement that we have as far as the plaintiff is concerned here pertaining to this matter is that he did insist upon the Continental check which carried the indorsement, beginning with line 14, on page 85, after stating they had received the check, "the following

is a copy of the statement on the back of said draft as first presented to plaintiff and the three words shown underscored are the words x'd out before said draft was accepted by plaintiff: 'Received of Continental Casualty Company the sum of \$66,-306.48 in full payment and satisfaction of judgment, interest, costs, etc.'" Now, your Honor had entered the judgment allowing the amount, allowing costs, and certain items, so that all were intended to be covered; finally I presume that the parties agreed that the [47] word "judgment" might cover the whole thing.

Now, on page 87 we find that the plaintiff now makes his statement to Mr. McKelvy of why he's bringing this suit, line 16: "I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run around."

Then on line 24: "I said, 'Well, I want to see what the score really is. I've gotten the run around for a long time and I would like to find out why I was led right up to the brink where I only had about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—"We can't represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.'"

I believe I have given your Honor every place and every instance that the Continental is men-

tioned. If I've omitted anything it's been an error of omission, not intention. It seems to me the case is simple. Was there a definite agreement? Where in this complaint can you find an allegation of a definite agreement between these parties as to what they were going to do to deprive this man of any rights or any privileges which he might have? Second, what part did Continental Casualty take? When did Continental Casualty speak? When did Continental Casualty do anything that would bring them [48] into a conspiracy agreement? When was there an overt act? Because I grant if there were a conspiracy agreement the act of any one of the conspirators, of course your Honor should know full well, would be an act for which each conspirator would have to respond. Where was the overt act, granting that there might be a conspiracy, where was the overt act by any conspirator where any unlawful thing was done or any lawful thing was done in an unlawful manner? Where is it? It's just not alleged.

Then finally, what are the allegations of damage? Your Honor certainly is not going to entertain a complaint with just the statement, "Well, I suffered damages by reason of all this, by reason of the delay that I was put to in getting my money, by reason of not getting my complaint filed before the period it was filed, although it was filed within time." Mrs. Curry read to your Honor from the transcript before Judge Lemmon. I just want to show your Honor the kindness with which this man was treated: "In granting the motion, I would

also grant you time within which to file an amended complaint, if you can, setting forth and overcoming this question of the plea of the statute of limitations. If you did that, you should go into your complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these defendants agree to do—and [49] then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the damages with connection between the act done or the acts done and the damage. You see, in your complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable."

In other words, though these folks moved in parallel lines with concert all the way through, unless there was a conspiracy agreement to rob this man of some right, or some overt act done that did do so after an agreement was reached that they would do it, the fact that they moved in parallel lines and concerted actions would have certainly no effect, and I don't believe that your Honor can find that the prosecution of this case on this question was any kind of an overt act that would indicate that it was in furtherance of any conspiracy, or that it was unlawfully done in a case where there's

as much doubt as to the rule to be applied to cause your Honor after hearing the entire case to comment as your Honor did, certainly is a case that very often the courts invite an appeal to determine.

I very much appreciate the courtesy your Honor has shown [50] me.

Mrs. Curry: May I interrupt? You made an inquiry about the statute of limitations, and I knew there was a case available. May I give it to you?

The Court: Yes, surely.

Mrs. Curry: It's the case of Northern Kentucky Telephone Co. vs. Southern Bell Telephone Co., 73 F. 2d 333. It's from the Sixth Circuit, and quoting that just to this extent: "A necessary corollary to this rule would seem to be that when there is an overt act or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run."

Mr. Egan: May it please the Court, my name is Granville Egan, your Honor, and I represent the defendants Macri. As the Court knows, I did not appear before your Honor in Yakima.

The Court: Yes, Mr. Holman was there.

Mr. Egan: And I know, of course, very little about what went on at that time, except that my clients, your Honor, feel that you gave the plaintiff every opportunity and every right that he was entitled to in that action. I am completely at a loss to know why the Macris are defendants herein unless it is an attempt to tie the case together between Mr. McKelvy and the Continental Casualty Company, because as your Honor reads the complaint you will

find that while there are disputes and conflicts existing prior to the filing of the complaint [51] in Yakima, in December, 1945, there is no allegation after that period of time of any actions on the part of the Macris of any unlawful act or any lawful act wrongfully done.

The complaint, your Honor, is a recitation from that time on of the proceedings in court and reciting simply that the Macris are the defendants and the proceedings as they went on.

Now, your Honor, we have spent considerable time here this afternoon. I would like to adopt the arguments of my two predecessors, because I think that they called the points to your attention very well. My clients feel it strange that a litigant should break them in one instance and then continue after them after he has exacted his pound of flesh. Perhaps we feel a little more bitter about this, your Honor, than the others do, and perhaps we do not have as much patience as we should have with a man bringing his own action in this. The record, and I'm not going outside the record, your Honor, will show that the Continental Casualty Company paid the judgment in this instance, took judgment over against my clients, and that that judgment remains unsatisfied, and I simply wish to repeat what I stated to you in the first instance, your Honor, that there is no allegation of any kind in this complaint of anything wrongfully done, lawfully or unlawfully, or any unlawful action performed in any manner after the filing of this complaint in December, 1945, and I [52] submit that

any action that took place prior to that date, your Honor, is satisfied by the judgment.

The Court: Mr. Schaefer, this situation here is an unusual one and one that is always difficult for a court, at least I have found it difficult, where a litigant is bringing his own case and is not represented by an attorney. I think the courts have been particularly careful to see that justice is done so far as it's possible in a situation of that sort. However, we have to follow the rules of law, of course, and apply them whether or not a litigant is represented by an attorney. I have this thought about it: I'm not trying to cut you off from argument, but it's inevitable in a situation of this sort that a layman litigant is not able to give the court very much help so far as the applicable law is concerned, and your facts are set out here pretty thoroughly. I assume that you put in everything you thought you had in the 90 pages of this complaint?

Mr. Schaefer: Practically so, yes.

The Court: And this is rather an emergency assignment, Judge Leavy is ill and there's a vacancy here in the Federal District Court in this district, and I came over here without as much prior notice or preparation as I ordinarily would have. The result was I didn't have an opportunity to go into this file or see it before today, and it's too voluminous for me to have gone through it in the time I had, and while I [53] dislike taking cases under advisement, I have gotten so busy I can scarcely afford the luxury to do so any more, I think I should take sufficient time, I haven't in mind writing an

opinion for the Federal Supplement, but to read the original complaint and read what Judge Lemon says about it, and what he did, and then the amended complaint and consider the arguments and the authorities that have been submitted, and any I might be able to find, in determining whether or not you stated a cause of action. I thought I'd let you know that's what I have in mind, and then I would welcome any argument you have at this time.

Mr. Schaefer: I appreciate that very much, your Honor, and I am quite concerned that you should have the opportunity to go through and really digest the whole of the file, because I understand it to be this way, that the attorneys in the opposition would take those parts of my complaint and cite those to you that are most favorable to themselves and their clients. I do have a few memorandums, Memorandum of M. C. Schaefer resisting motion of defendant, W. R. McKelvy, to dismiss plaintiff's amended complaint, and then there is——

The Court: Do you wish to submit that?

Mr. Schaefer: Yes, I would like to give you a copy of it.

The Court: Do you have copies for the attorneys?

Mr. Schaefer: No, I haven't.

Mr. Croson: No objection on our part. [54]

Mr. Egan: On the part of the defendants Macri, your Honor, there will be no objection to the court considering it.

Mrs. Curry: I'll reserve my stipulation on that.

The Court: I might say, I think they should be

put in the file and be available to counsel if they wish to look at it.

Mr. Croson: I assumed so.

The Court: And I'll say this, if I think there is anything in there that is very persuasive or might be controlling I'll take it up with counsel before acting on it. I don't know what it is; if there are authorities I take seriously, I think I should give you an opportunity to analyze them.

Mrs. Curry: Could not we look at it quickly before it goes in?

The Court: Yes.

Mr. Schaefer: On this my idea was to hand you a copy so if in my reading before the court I make any errors you would be able to check the errors.

The Court: How many pages are there?

The Clerk: About ten pages altogether.

The Court: I didn't understand; what Mr. Schaefer proposes to do is read it, and he's giving me a copy so I can more readily follow it.

Mr. Schaefer: That was it. If you had in mind you would read all of it—— [55]

The Court: If it's only ten pages you may read all of it.

Mr. Schaefer: I'm reading the memorandum of M. C. Schaefer resisting motion of defendant W. R. McKelvy to dismiss plaintiff's amended complaint. The amended complaint should be sustained because——

The Court: Mr. Schaefer, you have different ones here for different defendants?

Mr. Schaefer: I hope to have these apply to all defendants.

The Court: I know, but you labeled them differently, and I wasn't following the right one. Go ahead.

Mr. Schaefer: The statute of limitations does not bar this action. The running of the statute of limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Company*, 260 Mo. 212, 169 S.W. 145, the Court held that the statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Indiana 660, 161 N.E. 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the statute of limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colo. 365, 21 P. (2d) 182; 41 Hun. 645, 3 N.Y.S.R. 309. [56]

In *Northern Kentucky Telephone Co. vs. Southern Bell Telephone Co.*, 73 F. 2d 333, 97 A.L.R. 133, is an exhaustive opinion citing the rule in civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence. See also the annotation in 97 A.L.R. 137.

It must also be noted that in this action the Fed-

eral Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant. The case relied on by defendant, that is, *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff's original complaint.

The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully. In 168 P. (2d) 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not [57] required.

Here plaintiff alleges in Paragraph III, beginning line 23, page 1, that between 3-2-44 and 8-18-50 defendants did wrongfully and maliciously conspire, combine and confederate together with willful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph IV, line 9, page 92.

The principal allegations of conspiracy are that the defendants Macri on 12-7-43 signed a govern-

ment contract with the Bureau of Reclamation for certain work on the Roza Irrigation Project near Yakima, Washington, and on the same day defendant Continental Casualty Company by the agent and attorney in fact, the defendant Clyde Philp, issued the performance and payment bonds required by said Bureau of Reclamation, but only four days later on 12-11-43 this same Clyde Philp, together with defendant A. J. Goerig, entered into a silent partnership agreement with each other and also as joint venturers with defendants Macri in the performance of said general contract with the Bureau of Reclamation, none of which facts were known to plaintiff until 1946;

That plaintiff on 3-14-44 entered into a subcontract with defendants Macri to do certain form, steel and concrete [58] work on said Roza Irrigation Project, under which certain preparatory work was to be done and certain materials were to be furnished by defendants Macri (Items 1 through 5 of specific allegations under Paragraph III);

That defendants Macri purposely defaulted in the furnishing of material and performance of their preparatory work from 3-14-44 to 7-31-44 so that plaintiff could not commence pouring until 7-31-44, for the purpose of causing plaintiff to become bankrupt and to cause plaintiff severe financial hardship and in fact did cause severe hardship and almost caused bankruptcy.

On 7-31-44 defendants Macri then agreed orally to expedite their work so that plaintiff could complete his by 9-15-44, but again from 7-31-44 to

10-31-44 the same willful defaults were committed by defendants Macri and they further violated their contract with plaintiff by further refusing and failing to make payments to plaintiff as required by the terms of the subcontract with plaintiff.

On 11-1-44 defendant McKelvy became a member of the conspiracy. On that date plaintiff employed defendant McKelvy, made full disclosure of the acts of the defendants Macri, supplied him with memoranda of the conversations and meetings and oral agreements with said Macris, that defendant Continental Casualty Company might be involved; and sought the services of defendant McKelvy to terminate the said [59] subcontract with the said Macris and sue for the reasonable value of the work done by plaintiff.

That the firm of which defendant McKelvy is a partner, at that time and for years before and since, represented defendant Continental Casualty Company, but despite the conflict of interest, defendant McKelvy made no disclosure to plaintiff that his firm represented Continental Casualty Company; and plaintiff did not discover this fact until much later; that defendant McKelvy accepted plaintiff's employment and agreed to take steps to accomplish the desired result, by negotiation if possible and by suit if necessary. By interoffice memorandum dated 11-8-44 (photostat at end of item 16 following page 20) defendant McKelvy by his own handwriting—now, on that I probably want to make a correction; it may not be his handwriting, but it is handwriting from his office—indicated he felt there

was a good cause of action and that the remedy was in quantum meruit;—

The Court: Of course, your statement or the memorandum is, I presume, your conception of what you've alleged in your complaint. Of course, I have to be governed by what you've set out in your complaint. I'm just trying to visualize in my own mind what you claim this conspiracy was. I recognize the fact that you don't have to prove that the defendants got together and made an agreement as people do if they're selling horses or renting real estate, that a conspiracy is a sort of [60] a back-alley basement affair, usually, and can be proven by circumstantial evidence, but you have to show either directly or circumstantially that there was an agreement between them, an unlawful agreement to do something to damage you here. Now, it's your position that Macri failed to comply with his part of the contract and was slow in doing it in order to injure you by causing you to become bankrupt?

Mr. Schaefer: That is it, your Honor.

The Court: And is it your position that there was a preconceived arrangement between Macri and his bonding company that Macri should hold back, slow up, and bankrupt you? Is it your contention that the Continental Casualty Company agreed to that beforehand?

Mr. Schaefer: Not beforehand, your Honor, but McKelvy became a party, and in behalf of Continental Casualty Company—

The Court: You don't say so. All that you allege here is that you tried to hire him to bring

a suit against Macri, and you found out afterwards, you say, that he couldn't do it because Continental Casualty Company was one of the clients of his firm.

Mr. Schaefer: That's right.

The Court: But there was no allegation that he represented them in this particular case or this particular controversy or suit. Of course, he couldn't represent them, because you hadn't brought the suit yet. [61]

Mr. Schaefer: No, but he agreed to handle the suit, to carry the suit as against the Macris and Continental Casualty Company, and then he did not disclose to me that he represented them until——

The Court: I know what you claim, but when you went to see him how did he enter an agreement with Continental Casualty Company and Macri to ruin you by holding back on Macri's performance?

Mr. Schaefer: That is circumstantial.

The Court: Extremely circumstantial, I should say. Is it your position that after you went to see McKelvy and tried to get him to represent you, that he went then and talked to Continental and Macri and got into this scheme to ruin you and entered it and became a part of it then?

Mr. Schaefer: I claim that it was he, that by not bringing this suit as he had agreed to do in the first place, and the information and advice that he had given me during the course of his employment by myself, that he afforded the opportunities to the Macris and in behalf of the Continental Casualty so that they could bring this suit on contract number 2 down here in Portland, and the delays caused

out there on the job. Had, for example, had McKelvy started suit against the Continental Casualty Company, or had he informed me when I first employed McKelvy, had he then informed me that he represented Continental Casualty Company and handled all their work in the State of Washington except that as their office dished out to some other attorney to handle them, I would have certainly gone to some other attorney and we would have filed this suit and it wouldn't cost me some better than \$44,000 out of pocket money to handle this suit that was handled at Yakima.

The Court: Do you think somebody else could have handled it more cheaply than Mr. Olson did?

Mr. Schaefer: The thing is that Olson didn't get into the picture.

The Court: How much delay was there because of your going to Mr. McKelvy?

Mr. Schaefer: McKelvy delayed from the time I employed McKelvy, was I believe November 1, without looking at the record. November 1, 1944, to October 20, 1945, and that was after the work had been completed, so we hadn't yet done a third of the work on the job when McKelvy knew all the facts.

The Court: Of course, you had suits pending here and one in Portland and one in the Eastern District of Washington, and they finally were tried out in the Eastern District of Washington?

Mr. Schaefer: That's right, your Honor.

The Court: It was a very complex series of

cases, not only this one but others involving the Continental Casualty Company, and most of them were settled in pre-trial conference. [63]

Mr. Schaefer: That was with other parties.

The Court: Yes, but it necessarily took quite a long time to try out. It's your position that these proceedings in the Eastern District of Washington continue to constitute overt acts, that is, the proceedings that a defendant and a plaintiff would normally go through in an ordinary lawsuit, that every time the defendants did something over there it was an overt act?

Mr. Schaefer: Yes, it is.

The Court: In other words, an appeal taken by the Continental Casualty Company was an overt act?

Mr. Schaefer: Mainly on the basis here that McKelvy, through McKelvy's neglect to handle the case or to inform me in the first instance that I should get another attorney.

The Court: This I must say is a unique and a very unusual experience for me. It's difficult for me to understand, but I'm trying to get your point of view. Here's a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn't think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn't have bet one way or another what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. Mr. Holman, of course,

was an excellent lawyer and made a good presentation on the [64] other side. I couldn't see any indication of the slightest conspiracy. I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought. Now, I don't know; you think here that Mr. McKelvy and the bonding company and Mr. Macri conspired to hold up this performance and ruin you and bankrupt you?

Mr. Schaefer: That's right.

The Court: You really think that, huh?

Mr. Schaefer: I really do, and I believe you'll come to the same conclusion after you've read all of it.

The Court: Well, I'll read it, but I don't see how you can contend that when you bring suit against a bonding company and a prime contractor that they haven't got the right to defend that action. I would have thought, frankly, that these attorneys who defended the case, Mr. Holman and Mr. Ivy, I would have thought they weren't doing their full duty if they hadn't defended as they did and if they hadn't taken an appeal, because I thought as a former lawyer and a judge that it was close enough there should be an appeal. I couldn't [65]

see any indication that anybody was trying to conspire against you. I didn't think your skirts were any too clean either, although I thought the balance was in favor of you against Mr. Macri. I'm talking very frankly, and I don't suppose I have a right to take into consideration what I know about the lawsuit, but that's the way I regard that lawsuit. I'll limit myself to what you have here that I said in the lawsuit. Go ahead.

Mr. Schaefer: I was on page 4, I believe. I don't know if I can get back to just where I was on that. Defendant McKelvy by his own handwriting—which I then corrected—indicated he felt there was a good cause of action and that the remedy was in quantum meruit; yet the circumstances and facts alleged in items 6, page 5; 8, page 6; 17, 18, 19, 20, 21, 21A, on pages 22, 23, 24 and ending top of page 25; and particularly in item 24, page 25; item 25, page 26, clearly show that the advice given and actions taken by defendant McKelvy were all intended to and in fact did protect McKelvy's client, Continental Casualty Company, and also the Macris, and were intended to and in fact did further injure and damage plaintiff in that defendant McKelvy first prevailed upon plaintiff to complete the work rather than rescinding or terminating the contract; by not terminating the second subcontract he made it possible for the totally unfounded suit in Multnomah County, Oregon (item 28, page 28). [66]

The Court: Why do you say that was a totally unfounded suit? Wasn't there a dispute between you and the Macris at that time?

Mr. Schaefer: There was a dispute.

The Court: You think only you had the right to resolve that into court by filing an action?

Mr. Schaefer: No; in this way, that McKelvy was informed and had the information of Macri not having prepared his own work, and his specification called for a contract with the Bureau of Reclamation, called for him to start work within thirty days after the signing of the contract, and it was I believe somewhere in the neighborhood of ten months before Macri started any performance on that job, and Mr. McKelvy's office had written a letter——

The Court: He claimed he had a very difficult time getting materials, didn't he? That was at a time when materials were scarce?

Mr. Schaefer: Well, he claimed that, but as the Bureau of Reclamation said, all other contractors were ahead of their work, and he was far behind.

The Court: But at any rate there was a controversy, and Macri started a suit against you in Oregon, and Mr. McKelvy didn't act as his attorney in that, did he?

Mr. Schaefer: No.

The Court: That was Mr. Holman. [67]

Mr. Schaefer: Had he sent that letter it would have been a whole lot of proof against the contentions, and against the condition that existed out there on the job, and which letter he stated wasn't sent.

The Court: I'm trying to get at your point of view, Mr. Schaefer. It seems to me your complaint

indicates that you allege certain things, that Macri was slow in getting started, and that he held back his performance, and then McKelvy failed to disclose to you that his firm represented or at least they had some arrangement to represent the Continental Casualty Company, and held you up in getting your suit started, and that this suit was brought over here by you against Macri and the Continental, and that certain proceedings went on in that up to the time they paid you the judgment, but what is there to connect these things together and bind them together into an agreement between these defendants? Where and when and what did they do against you that is the basis of this million dollars in damages?

Mr. Schaefer: I think that from going down through the complaint, which is the thing that I had thought you had indicated that you would want to read——

The Court: Well, yes, I'll do that, but where in the complaint—you've only alleged it in general language, haven't you?

Mr. Schaefer: It is the different steps as the sequence, [68] as you go down through and take the different dates and different actions taken at different times, it will just draw that kind of a picture. It's a conclusion that, as I see it, that one would have to come to, that there was that conspiracy. Therefore I figured that in reading this to your Honor, and then in having that to go over the complaint and the whole file, that you will see exactly what I'm referring to, what I mean by it.

The Court: The difficulty is here, of course, that most of these things you've alleged as overt acts do not, because of their nature, carry any inference that they were the product of a conspiracy or that they were intended to do you injury. If there are certain types of unlawful action you can show have been taken, of course we might assume, since there is a concert of action and these things were done in the way they were, we can relate them back and say "These people must have intended the consequences of their unlawful and improper acts," and we can assume they must have conspired; but here you've got a perfectly natural and normal sequence of events, that a subcontractor got into a disagreement and a jam with his general contractor, here's a bonding company that stands off in an ordinary way, you went into court and it was determined and the defendants appealed, as they had a perfect right to do, and tried to get certiorari, and finally paid you the judgment. You won the lawsuit and they lost. [69] Aside from that is this difference with Mr. McKelvy that came after you claim the Macris tried to damage you. The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you've got, as I see it, that wouldn't be in the ordinary course of this kind of a transaction.

Mr. Schaefer: Well, if it were that Macri went broke and bankrupt and the Continental Casualty Company was to foot the bill, it surely was to the Continental Casualty Company's interest that Mc-

Kelvy represent me in the way that he represented me.

The Court: What did that serve them? They lost the lawsuit and they had to pay. What good would it do them whether you went broke or continued to be prosperous? They had to pay the full amount of the judgment, on their bond.

Mr. Schaefer: They did later, yes, after I had employed another attorney.

The Court: Well, if the Continental Casualty Company had made a deal with McKelvy to block you out of court, don't you think they'd have blocked you another month, until your statute of limitations had run, the one-year statute under the Miller Act? McKelvy must be a very bungling conspirator if he doesn't hold you up another month and keep you from going into court, when he tells you you've got a month left and you go get another attorney and start your suit. A prime [70] contractor doesn't delay performance at the beginning of the contract in order to ruin a subcontractor, and of all things, a bonding company wouldn't conspire with the main contractor and say "you hold back and we'll fix this fellow Schaefer, we'll break him." Do you think the Continental Casualty Company would do that? That's what you're claiming, although I don't think you allege it in your complaint.

Mr. Schaefer: I'm saying they went along on it. I'm not saying the Continental Casualty Company got into a meeting with McKelvy and the Macris and Philp and Goerig and said "We're going to break Schaefer," no. The thing is that it so hap-

pened the circumstances worked in together to bring that about, or practically bring that about.

The Court: It happened that your unfortunate experience with McKelvy, the delay in Mr. Macri's performance, the things that the Continental Casualty Company did in contesting this lawsuit, all of them turned out to injure you very greatly, but that doesn't make a conspiracy unless there was an arrangement and an agreement between them beforehand to do that sort of thing.

Mr. Schaefer: And a conspiracy, I think I have more of such law cited in here.

The Court: All right, go ahead. Let's see, I think you were on page 4. I'll try not to interrupt you too much.

Mr. Schaefer: Further in that he made possible the [71] asserted dissipation or rumored possible secretion of assets by defendants Macri, and thereafter advised plaintiff to follow a course of action amounting to fraudulent conveyance of assets with possible criminal overtones, and finally when none of these succeeded purposely attempted to permit plaintiff to delay filing suit against defendants Macri until the statute of limitations had run, and but for the diligence of plaintiff might have succeeded in any one of his efforts.

That defendants Macri then furthered the conspiracy by filing a malicious suit in Portland which was completely without foundation and known to be so and intended to dry up plaintiff's credit and thus render impossible the prosecution of his suit in Yakima, Washington; that their action in Port-

land did dry up his credit, and only by the most extreme application of perseverance could plaintiff survive at all in his business operations there, and even yet has not fully recovered from the effects of said suit and has lost large sums of money as the direct result thereof.

Finally after trial of the Yakima suit by another attorney (who did what McKelvy had agreed to do), the defendants Macri and Continental Casualty Company by unfounded actions and by abuse and misuse of the judicial process, all in furtherance of the original conspiracy, dragged the matter on through separate appeals and willful delays in making settlement after final judgment on appeal to 11-9-49, and on 8-16-50 [72] defendant McKelvy again entered the picture by trying to pressure plaintiff into making any kind of payment on his bill to plaintiff to preclude the filing of the present case.

In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 P. (2d) 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and inter-related activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

As to defendant's objection that the complaint is verbose, the authorities and argument last above are sufficient to meet this objection, as such alle-

gation of the specific statements, omissions and actions is necessary to state a cause of action. In the motion of defendant to plaintiff's first cause of action the position taken was that the complaint contained merely conclusions and not ultimate fact from which the conclusion could be drawn. Now that plaintiff alleges the facts in detail to support the conclusion he seeks to have them stricken as being prolix and verbose. Plaintiff contends that the facts as stated are necessary and proper.

As to item 4 of defendant's motion, there is a misconception of plaintiff's allegations. Plaintiff alleged only that the firm of Skeel, McKelvy, et al., represented [73] Continental Casualty Company at the time defendant McKelvy was employed by plaintiff and continued thereafter to represent them and in fact represented defendant Continental Casualty Company on the first day of the trial of plaintiff's case vs. Macris and Continental Casualty Company in Yakima, as more fully appears from the transcript set out in full. Thereafter it is admitted that at least of record in that case other counsel represented Continental Casualty Company and there is no inconsistency whatsoever.

The Court: I'm not sure yet whether you claim that Mr. McKelvy represented the Continental Casualty Company in your suit against Macri. He didn't appear of record, or I mean his firm didn't appear of record in that suit, as I recall. Mr. Ivy represented the Continental Casualty Company in that case.

Mr. Schaefer: He did later, yes.

The Court: Later? I thought he appeared there the first day that we had the pre-trial conference.

Mr. Schaefer: The first day that I was in court, yes, that we were in court, Ivy was there. I believe the date of our case was set for the 20th of February, or something like that, and then it was changed over to the 24th, and this other matter come out on the 21st.

The Court: Well, at any rate I don't suppose it's necessary to discuss it, because I'll check through and see what [74] your allegation is and what this file shows, that's what I have to be concerned about. What do you have there, the record of the case in the Court of Appeals?

Mr. Schaefer: Yes.

The Court: Does that show an appearance by Mr. McKelvy?

Mr. Schaefer: 2239, and then on page 2246 you'll note what Mr. Skeel has to say, and also Mr. Holman.

Mrs. Curry: Your Honor, that was the transcript of the evidence in the use cases, which on stipulation was incorporated in your case, or in Schaefer's case. They just took out a part of the records of the case that we were representing the Continental Casualty, to save time, and I call your attention that there is this—I don't know whether it's a misprint in that transcript or not, but it does show Schaefer vs. Macri, number 246, then it goes on and incorporates that part without any preliminaries, that part of those use cases, and Mr. Taylor some time ago made a transcript of that, and I'd

just as soon file that here as a part of this now, but that transcript will show that pages before that the proceedings were all ended. That was like an exhibit.

The Court: Yes, I notice that Mr. Hawkins seems to be the attorney in this matter. There were several of those cases, and the Continental Casualty Company was interested in the use cases as well as your case. All right, go ahead.

Mr. Schaefer: Now, I did not take note of just where I [75] cut off there.

The Court: You finished the other one, I thought, this memorandum that you have in resistance to McKelvy's motion to dismiss.

Mr. Schaefer: Yes; now then, I didn't get started on plaintiff's statement resisting alternate motion of defendant McKelvy to strike.

The Court: All right.

Mr. Schaefer: The record shows on its face that Mr. Skeel, of the firm of Skeel, McKelvy, et al., did represent Continental Casualty Company in plaintiff's case, No. 246, in Yakima on the first day of the hearing and that thereafter other attorneys appeared. No argument is necessary, as the record speaks for itself.

Line 12, page 28, was an attempt on the part of plaintiff to plead that the suit filed in Multnomah County, while admitted of record only by the defendants Macri, was in fact the act of the other defendants as well, and as such should be permitted to stand.

The Court: What significance do you attach to

the fact that Mr. Skeel appeared over there representing the Continental Casualty Company?

Mr. Schaefer: To the greater amount, we'll say, that the office—to give proof that the office of Skeel, McKelvy, Henke, Evenson and Uhlmann did represent Continental before [76] and during my suit as against the Continental Casualty Company, so they were the agents for other matters, they were the agent for Continental Casualty Company, and that coupled with other matters that I have expressed in my complaint there wherein Mr. McKelvy told me that they handled—that Continental Casualty was one of their largest accounts, and that they practically handled all of Continental Casualty Company's legal matters in the State of Washington, so in this case here, after——

The Court: Well, you still contend that they appeared for one day in this case of yours against Macri in Yakima?

Mr. Schaefer: Yes, bringing that into the picture mainly for showing that they were representing Continental Casualty Company.

The Court: Why should they appear there for one day and then call Mr. Ivy in after that?

Mr. Schaefer: Well, that, I imagine it didn't look too well that they'd represent Continental Casualty Company after having represented me.

The Court: And they just discovered that or concluded that after appearing one day in court over there for Continental against you, is that your position?

Mr. Schaefer: Well, no, I'm not making that

my position. The other matters were so intertwined with the same matter that we were concerned about—— [77]

The Court: I think you're mistaken about that, Mr. Schaefer. I think Mr. Skeel appeared in one of the other numbered cases in which the Continental Casualty Company was interested, of course, as bonding company for Mr. Macri, but in which you were not the plaintiff. I'll check that up as best I can.

(Short recess.)

The Court: All right, go ahead, Mr. Schaefer.

Mr. Schaefer: Memorandum of M. C. Schaefer resisting motion of Continental Casualty Company to dismiss or to strike. Defendant's proposition of law and citation of supporting authorities is generally conceded to be correct. Plaintiff contends, however, that the facts alleged in his amended complaint do state a cause of action as to defendant Continental Casualty Company.

The essential facts alleged as to participation by defendant, Continental Casualty Company, in a conspiracy to injure, defraud and damage plaintiff, are as follows:

From the inception of work by plaintiff in 1944 on his subcontract ostensibly with the defendants Macri for concrete work at Yakima, Washington, 'til August, 1950, there was a web of intrigue, behind the scenes activity, undisclosed parties whose interests were interlocking with one another and antagonistic to plaintiff. One of the principal participants was Continental Casualty Company. [78]

Thus plaintiff was made the brunt of wilful, malicious and intentional activity—so far as then known—by defendants, Macri, intended to discredit, bankrupt and ruin plaintiff from 1944 when he started work on the Roza Irrigation Project, until 1950. But as the plot unfolded it became apparent that all the initial phases of the common scheme were joined in by Continental Casualty Company behind the scenes and off the record and later Continental Casualty Company led the way.

Through its agent and attorney in fact, the defendant Philp, Continental Casualty Company issued performance and payment bonds, guaranteeing performance and payment by the defendants Macri at the same time the said Philp was also a partner with one Goerig and jointly Philp and Goerig were silent joint ventures with the defendants Macri on this work. Thus all the intentional acts ostensibly of the Macris, were actually the acts of Continental Casualty Company.

Then follows a complex series of actions, by the Macris (and although not at the time known to plaintiff) also by the Continental Casualty Company through its agent Philp and by Philp and Goerig personally attempting to and almost succeeding in bankrupting plaintiff and causing severe loss and damage.

Then there is injected into the conspiracy one W. R. McKelvy, attorney for Continental Casualty Company (again a [79] fact not known to plaintiff until a later date) who advised plaintiff to follow courses of action which show beyond any equivoca-

tion that said McKelvy was working against plaintiff for Continental Casualty Company, Macris and their joint venturers, Philp and Goerig and only by extreme diligence was plaintiff able to prevent all the parties from succeeding in their scheme.

McKelvy also dealt very closely with one Holman the ostensible attorney for the Macris, but who had formerly been associated in the office with McKelvy and who worked in close harmony with McKelvy at all times, including the filing of a totally groundless suit in Multnomah County, Oregon, when it became apparent that all other attempts to bankrupt plaintiff were failing.

With defendant's general proposition of law and his citation in support thereof plaintiff has no serious disagreement. Plaintiff does contend that the facts alleged in his amended complaint do state a cause of action as to defendant Continental Casualty Company. The essential facts, as to this defendant, are:

In 1943 its agent and attorney in fact, the defendant Philp, signs performance and payment bonds for defendants Macri and while still in the employ of defendant Continental Casualty Company its said agent Philp became a partner with the defendant Goerig and Philp and Goerig became silent joint [80] venturers with the persons being bonded by Continental Casualty Company, namely the defendants Macri. All this is known by Continental Casualty Company but not plaintiff until several years later when plaintiff filed a suit.

Then came the suit in Yakima which Continental Casualty Company and the Macris lost and which the defendants Macri did not appeal within the time provided, but Continental Casualty Company did and thereafter the court ruled that the Macris could appeal, despite being barred by the time limitation, since Continental Casualty Company did appeal within the permitted time. At all times thereafter including appeal to the U. S. Supreme Court, Continental Casualty Company led the way on this series of litigation and appeals. It did not follow along with its prime contractor.

Thus, by a series of subversive maneuvers known to and acquiesced in by Continental Casualty Company through its agent and attorney, the defendant McKelvy, and later directly by Continental Casualty Company in leading the way and carrying the ball at all times after adverse judgment in Yakima, defendant Continental Casualty Company was one of the prime participants in and causative factors of plaintiff's damage.

Clearly, while the complaint necessarily is complex and difficult to phrase in a concise manner, it certainly does state facts supporting the general allegation of defendant Continental Casualty Company being a participant in the [81] conspiracy.

As to the statute of limitations point, reference is made to plaintiff's memorandum on McKelvy's similar motion.

As to the objection that complaint is verbose, plaintiff concedes that the law is fairly stated, but maintains that any lesser allegation of details would

possibly defeat the complaint on the grounds that the allegations are mere conclusions, rather than ultimate facts from which the conclusion of conspiracy could be drawn.

The authorities are so numerous that corporations are liable for the torts of their officers, agents and employees as hardly to require citation, but attention is drawn to 13 Am. Jur., corporations, Section 1131, page 1056, which states the general rule and also the rule that specifically as to conspiracy a corporation is liable for acts of its officers, agents and employees in conspiracy with other persons.

As to the amount of the damage, I figured that that was a thing that the proof would be presented on at the time that this case came to trial before the jury, and I might state that I have some inventions that this case has cost me this burdensome amount of money has stopped me from going ahead with those inventions, as well as having kept me in the concrete subcontracting business instead of in the general contracting business. I believe that we'll leave it [82] go at this, and then as you stated, you would read the whole of the complaint and I believe that everything is pretty well stated.

There's one point I might make here yet, and that is that Mr. Olson at the time or before the Macris had filed in the Circuit Court of Appeals and after their time had expired according to our thought in the matter, we called the attorney for Continental Casualty Company and asked him whether or not the Macris were going to file, and they said well, they didn't know, and we said well, you can make

reference to the matters that they indicated in their brief, and this attorney for Continental Casualty Company said "Well, we were probably premature in making that statement," so I think that most everything else is pretty well covered.

I am not an attorney, and I did not know of the term quantum meruit, and I had to find out what it meant after seeing the work in the photostatic copy here, by study. I've been studying a certain amount of law, and you can't get an attorney, and the attorneys that I have contacted have told me "We might represent you, but I wouldn't represent you against another attorney, against a brother attorney."

Now, Olson, which I cited in the last of my complaint here, I cite that I had a telephone conversation with Olson, and Olson said "Why don't you leave McKelvy out; I think you've got a good case against Continental Casualty Company, [83] but I can't represent you on that if you're going to sue an attorney, if you're going to sue McKelvy now; McKelvy recommended me to you," and I said "Well, you shouldn't feel that way about it; I asked McKelvy, I felt a whole lot different than that, but I asked McKelvy whether he could give a good attorney over at Yakima, and he named four, and Olson was the third man named." My idea in asking Mr. McKelvy wasn't to take his advice as much as it was to find out and perhaps do some close checking as to taking some other attorney than named by Mr. McKelvy.

The Court: You couldn't have been too much

dissatisfied at that time, or you wouldn't have listened to him at all, would you?

Mr. Schaefer: Had he named only one or two, I wouldn't have gone to him.

The Court: Since he named more than that, you thought it was all right.

Mr. Schaefer: I had a friend of mine in Portland check up as to attorneys in Yakima, and he felt I should go and see Mr. Olson.

The Court: As I have stated here, I'll go over this complaint and this rather voluminous file and look up the authorities and come to some decision. You're in Portland, aren't you, Mr. Schaefer?

Mr. Schaefer: Yes, your Honor. [84]

The Court: Well, I think perhaps I had just better notify you, then, of my ruling, because I wouldn't want you to make a trip back up here to hear an oral announcement of it. I haven't in mind writing an opinion of the case. I do wish to check over, though, and see what Judge Lemmon's reasons were, and what difference there is between the first and second complaint. I'm going to try to get this done in the next few days, because I have troubles enough of my own in Eastern Washington. I think I'll just write you a letter and let you know what the ruling is, and perhaps the reason. This case naturally was of some personal interest to me because of the fact I had presided in your case over there. The conversations I have had with you aren't going to enter into this case; I realize I'm a visiting judge in this suit and I'm going to be guided only by the file here, your complaint, and

such of my remarks as are included in the complaint.

Mrs. Curry: We have had a little difficulty because of the fact that you judges are here today and gone tomorrow, we had some difficulty getting an order entered before. I couldn't understand the rules; I filed a proposed order and waited fifteen days and then found out that we would have to have it signed when Judge Lemmon was in his hotel room dashing for the airplane. Would it be out of line to suggest today that we might present an order? [85]

The Court: Well, I think that I simply will enter an order and send you copies of it. This isn't like settling findings of fact. These motions will be denied or they will be granted.

Mrs. Curry: We're asking your Honor for a judgment of dismissal with prejudice.

The Court: Well, if your motion is granted I presume you would be entitled to that.

Mrs. Curry: Then we'll have to get a judgment entered, you see.

The Court: Well, I don't know—what are the local rules, Mr. Thomas, about entering judgments? Do they have to give fifteen days' notice?

Mr. Thomas: No, fifteen days' notice is not required, your Honor. You can enter a judgment of dismissal at any time. It was on the settlement of findings of fact I think they were referring to.

Mrs. Curry: Well, that was the only thing I could see that would apply.

The Court: I have required either an endorsement of agreement or an agreement as to form on a finding, but on a motion such as a motion to dismiss I haven't required that; I think it's so simple that it could be done without having the attorneys present.

Mr. Thomas: I think our rule is the same as yours. [86]

The Court: What I usually do is to write out a letter and say that I've come to the conclusion these motions should be granted, or should be denied, and then perhaps give you a reason. In this case I don't think I'd elaborate very much unless I elaborated a great deal, because of the volume of this complaint.

Mrs. Curry: You see, I won't be able to get an order approved as to form.

The Court: No, I know that's true. I started to say what my usual practice is would be to write out a letter telling you the motions will be denied or granted, and that an order in accordance with these views be presented, and all I'll require is a copy be sent to Mr. Schaefer, or he can send copies to you if it's in his favor.

Mrs. Curry: I have a proposed order.

The Court: You have? Well, you might submit it, and give Mr. Schaefer a copy and then I can use that. If Mr. Schaefer has any objection he can write me about it, and send you a copy of the letter. If I decide in Mr. Schaefer's favor that would be very simple; I can enter the order myself that the motion is denied.

Mr. Schaefer: This matter of course on my part has been prepared and my argument here today has been on the basis that more facts would be brought out at trial before the jury.

The Court: Well, I presumed so, yes. All right. The [87] court will adjourn until tomorrow morning at 10 o'clock.

(Hearing concluded.)

Reporter's Certificate

United States of America,
Western District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on April 16, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above entitled cause.

Dated this 21st day of April, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 25, 1951. [88]

Chambers of
Sam M. Driver
United States District Judge
Spokane 6, Washington

May 2, 1951.

Mr. M. C. Schaefer,
3535 East Burnside Street,
Portland, Oregon.

Skeel, McKelvy, Henke, Evenson & Uhlmann,
914 Insurance Building,
Seattle, Washington.

Granville Egan,
565 Olympic National Building,
Seattle 4, Washington.

Carl E. Croson,
900 Insurance Building,
Seattle 4, Washington.

In Re: Schaefer vs. Macri, et al.,
No. 2673 Civil.

Gentlemen:

The purpose of this letter is to inform the plaintiff and counsel for the defendants of my ruling on the various motions to dismiss the amended complaint, argued before me on April 16, 1951, and taken under advisement.

In granting motions to dismiss the original complaint, Judge Lemmon in his oral remarks pointed out that the statute of limitations would bar plaintiff's action unless a conspiracy was alleged in which it appeared that the last overt act was within

the statutory period. Judge Lemmon explained to the plaintiff that a conspiracy is an agreement between two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, and that in the complaint the plaintiff had stated a bare conclusion that the defendants conspired to injure, defraud and damage him, but had not set out specifically what unlawful or improper agreement he claimed.

The plaintiff, who is acting as his own counsel, it seems to me misunderstood Judge Lemmon's statements, as he has not in the amended complaint definitely and specifically set out what unlawful agreement, confederation or preconceived plan was entered into by the defendants to injure and damage him, but on the other hand, has set out in minute detail numerous overt acts which he claims were done in furtherance of a conspiracy.

In the opening sentence of paragraph III of the amended complaint there appears the statement that the defendant "did wrongfully and maliciously conspire, combine and confederate together with wilful malicious intent to injure, damage and defraud plaintiff." On page 5 of the complaint there appears the statement that defendants, Macri, Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, defendant Philp, "were attempting from the beginning of said subcontract to bankrupt plaintiff, ruin his reputation and credit, by not paying plaintiff as per contract requirements, by not performing their part of the

work, or else performing it badly, thereby increasing cost to plaintiff and hampering and delaying plaintiff and exhausting plaintiff's operating capital."

If it is the plaintiff's position that these things, which he states on page 5, the defendants were attempting to do were the things that they agreed and as a preconceived plan conspired to do, he should definitely so state, and should then set out in the plain, concise and direct way the rules of civil procedure prescribe, the principal overt acts done in furtherance of the conspiracy including the latest ones which occurred within the statutory period of limitation.

In passing upon the motion to dismiss, I have in mind the very liberal rule which is applied in favor of the plaintiff when a motion is made to dismiss the complaint. The rule is that the complaint should be construed in the light most favorable to the plaintiff, and the motion should not be granted unless under no conceivable factual situation which might be established within the framework of the complaint could any relief be granted to the plaintiff. *Jefferson Hotel Co. vs. Jefferson Standard Life Insurance Co.*, 7 F.R.D. 722; *J. W. Terteling & Sons vs. Central Nebraska Pub. P & I Dist.*, 8 F.R.D. 210; and *Kansas Nebraska Natural Gas Company vs. City of Hastings*, 10 F.R.D. 280.

However, rule 8a of the civil rules provides that the pleadings shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and other parts of the rules

and the forms set out therein show that they contemplate short, plain, simple and direct statements of facts in pleadings. A complaint can so offend against these provisions of the rules as to the subject to motion to dismiss. *Picking vs. Pa. R. R. Co.*, 3 F.R.D. 425; and *Capdevielle vs. American Commercial Alcohol Corp.*, 1 F.R.D. 365. The following language from the opinion, page 425, in *Picking vs. Pa. R. R. Co.* cited above, is applicable also to the amended complaint in the present case: "The complaint * * * is complex, prolix, contradictory and replete with conclusions inextricably entangled with allegations of fact."

The amended complaint consists of upward of 92 typewritten pages. Paragraph III contains 62 separate subdivisions. It goes into minute details concerning the various transactions covered, and sets out not only evidentiary matters, but in many instances hearsay and hearsay conversations which would not even be admissible in evidence. It would impose an unfair burden upon the defendants to require them to answer such a pleading. The various motions to dismiss therefore will be granted, but the plaintiff will be given leave to file a second amended complaint within thirty days after the filing of the orders granting the motions to dismiss.

Orders may be submitted in accordance with the above. I suggest that forms of order be mailed to me at Spokane, Washington, and that copies thereof be sent to the plaintiff at his Portland address. I

shall then wait three days after receipt of the proposed orders for objection or comment from the plaintiff, and then act upon them.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed May 2, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Cor-
poration; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

ORDER OF DISMISSAL

This matter came on regularly for hearing before the above-entitled court on April 16, 1951, on motions for an order to dismiss the above-entitled action by defendants Sam Macri, Don Macri and Joe Macri, by defendant W. R. McKelvy, and by defendant, Continental Casualty Company, a cor-

poration. Defendants Macri appeared by their attorney, Granville Egan; defendant McKelvy appeared by his attorney, A. P. Curry; and defendant Continental Casualty Company appeared by its attorneys, Carl E. Croson and Willard Hatch. The plaintiff M. C. Schaefer appeared per se. The court heard the arguments for and against said motions and hereby finds that the motions to dismiss, and each of them, should be granted upon the grounds and for the reasons that plaintiff's complaint does not set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief, and its averments are not simple, concise and direct, but, on the contrary, are verbose, redundant, unnecessarily detailed, and contain much evidentiary, hearsay, and immaterial matter contrary to the requirements of Rule 8 (a) and (e) of the Rules of Civil Procedure and the complaint does not conform to Rule 10 (b) of such rules which requires that all averments of a claim shall be made in numbered paragraphs, the contents of each of which shall be limited, as far as practicable, to the statement of a single set of circumstances.

It Is Now Therefore Ordered, that the above-mentioned motions to dismiss the complaint, and each of them, are granted, and the above-entitled action as to the defendants Sam Macri, Don Macri and Joe Macri, defendant W. R. McKelvy, and defendant Continental Casualty Company, a corporation, is hereby dismissed, but the plaintiff is hereby granted thirty days from the date of the filing of

this order within which to file a second amended complaint.

Dated this 16th day of May, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed and entered May 17, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673 Civil

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Corpo-
ration; A. J. GOERIG and CLYDE PHILP,
Individuals,

Defendants.

SECOND AMENDED COMPLAINT

I.

Jurisdiction is founded on diversity of citizen-
ship and amount.

Plaintiff is a resident of the State of Oregon,
and Defendants are all residents of the State of
Washington, except the Defendant, Continental

Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds \$3,000.00.

II.

That between the dates March 2, 1944, and August 18, 1950, the defendant, Continental Casualty Company, a corporation, was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors; that the defendant Clyde Philp was the agent and attorney in fact in the State of Washington for said Continental Casualty Company; that said defendant Clyde Philp also was a partner with the defendant A. J. Goerig; and said Philp and Goerig were silent joint venturers with the defendants Sam Macri, Don Macri and Joe Macri; that said defendants Macri held a prime contract with the United States of America, acting by and through the Bureau of Reclamation, for certain construction work known as the Roza Irrigation Project, near Yakima, Washington; the defendant McKelvy was a practicing attorney and a member of the law firm of Skeel, McKelvy, Henke, Evanson and Uhlman, general counsel for said Continental Casualty Company; and plaintiff at all times herein complained of and for many years prior thereto was engaged in business as a general contractor and as a concrete contractor, and held a subcontract under the said Macris for the

performance of certain concrete work on said Roza Irrigation Project.

III.

That on or about the 7th day of December, 1943, the said defendants Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri and Company, signed a prime contract with the said Bureau of Reclamation for the construction of certain earthwork, pipelines, structures, laterals, and sub-laterals, under schedule I of Specification 1062, Roza Division, Yakima Project, Washington; and on the same day the defendant Continental Casualty Company issued its performance bond and its payment bond protecting the United States and, among others, this plaintiff, which said bonds were duly signed and sealed by the defendant Clyde Philp as attorney in fact for Continental Casualty Company; copy of each of said bonds is attached hereto, marked Exhibit A, and by this reference thereto made a part hereof as though set out herein in full.

IV.

That on or about the 11th day of December, 1943, the defendant Clyde Philp entered into a partnership agreement with the defendant A. J. Goerig and on the same day the said partnership of Philp and Goerig became silent joint venturers with the defendants Macri in the performance of the said contract with the Bureau of Reclamation referred to in Paragraph III hereof, and also as silent joint venturers in the performance of a number of other contracts. Said Philp and Goerig were partners

and joint venturers with said Macris on other jobs both before and after the ones herein complained of.

V.

That on or about the 14th day of March, 1944, the plaintiff signed a subcontract with the said Macris in connection with their performance of said job specification 1062, pursuant to the terms of which plaintiff was required to build forms, place reinforcing steel, pour and finish certain concrete work on said Roza Irrigation Project.

VI.

That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:

A. The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under

the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work, all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said subcontract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job, and although it was not known to plaintiff at the time of commission thereof, said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company.

B. On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plain-

tiff of a cause of suit or action against Philp and Goerig.

C. That on or about the 1st day of November, 1944, the defendant McKelvy became a co-conspirator with the aforementioned defendants; on that date plaintiff employed said defendant McKelvy and the said defendant McKelvy accepted employment by plaintiff as his attorney to terminate said subcontract dated March 15, 1944, on account of the breaches by said Macris and to sue said Macris and Continental Casualty Company for the reasonable value of the work done to the date of termination, and also to terminate a second subcontract with said Macris under job specification 1068, dated April 21st, 1944, under which no work had been done by either plaintiff or said Macris as of that time.

Plaintiff at that time made full disclosure to said defendant McKelvy of plaintiff's strained financial condition, brought about by the acts and omissions of said Macris and the defaults of said Macris in not making the required payments to the plaintiff and their verbal agreement that they would so conduct their phase of the work that plaintiff would be able to complete both subcontracts by September 15, 1944; and further made disclosure to defendant McKelvy of the failure of the said Macris to live up to said oral agreement, of the defaults by said Macris in not furnishing suitable materials, in not supplying said materials timely; in not properly performing the excavating and grading; in not doing said excavations and grading timely. Plaintiff

also showed defendant McKelvy pictures of the poor grade of lumber and pictures of the improper excavations and grading, and handed to defendant McKelvy copies of memoranda prepared by plaintiff immediately following the conclusion of conferences between plaintiff and defendants Macri and their representatives on April 29th, 1944, and June 15, 1944, copies of which memoranda are attached hereto as Exhibits C and D respectively and by this reference made a part hereof as though set out herein in full. Plaintiff also advised said defendant McKelvy of statements heard by plaintiff from two different sources to the effect that the said defendants Macri were purposely attempting to bankrupt the plaintiff and force him out of business, and at that time also handed defendant McKelvy copy of letter of September 18, 1944, to the said Macris, copy to plaintiff, wherein said Bureau of Reclamation was objecting to the delay by the Macris in performing the work under said contract, copy of which letter is attached hereto as Exhibit E and by this reference made a part hereof as though set out herein in full.

Plaintiff further informed defendant McKelvy that said Macris were bonded by Continental Casualty Company with both performance and payment bonds and that plaintiff in addition to the contract on which the complaints were being made, had signed a second subcontract on April 21st, 1944, for the performance of similar work but that as of April 21, 1944, the said Macris did not then have a prime contract with the Bureau of Reclamation

and that no work had been done by either party under the second agreement; that on May 22, 1944, all but two of plaintiff's men were withdrawn from work under job specification No. 1062 because of lack of lumber and lack of excavations, and even these two men were left on the job solely to prevent Macri Co. from claiming default or abandonment by plaintiff and plaintiff was not able to return additional men to the job until June 29th, 1944, and it was not until July 31, 1944, that plaintiff was able to start pouring concrete, all because of the acts, omissions and delays by said defendants Macri, et al.

The defendant McKelvy advised plaintiff that he would accept such employment but that he did not think it would be necessary to file suit, since the Macris' attorney, a Mr. Holman, had previously been associated in McKelvy's office for a number of years, and that though Holman was then associated with another office, that Holman and McKelvy were cooperating as though they were still associated in the same office; that McKelvy would contact Holman and if the negotiations were not satisfactory would promptly file suit. At said conference on November 1, 1944, with defendant McKelvy, McKelvy's partner, Skeel, was called in by McKelvy and participated in part of the conference and expressed the opinion at the time that plaintiff probably could not hold the Macris unless he had carefully segregated costs showing what the cost would be had the work been properly performed by Macris and the extra cost occasioned by their default, and

also the opinion that plaintiff probably could not hold Continental Casualty Company liable.

Said defendant McKelvy, on or about November 8, 1944, prepared an inter-office memorandum addressed to a Mr. Kelley, associated in the firm, summarizing some of the representations made by plaintiff. On the margin of said memorandum Mr. Kelley wrote copious notes, all to the general effect that a good cause of action existed in favor of plaintiff against said defendants Macri and that the remedy consisted in cancelling the contract and suing in quantum meruit for recovery of the reasonable value of the work done, together with numerous citations of authority. Inadvertently, this original memorandum, together with the notations thereon, was handed by defendant McKelvy to plaintiff on or about October 20, 1945, at which time defendant McKelvy terminated his employment as plaintiff's attorney; copy of said memorandum is attached hereto as Exhibit F, and by this reference made a part hereof as though set out herein in full.

D. That defendant McKelvy, while professing to act for and in behalf of plaintiff, from the date of his employment on or about November 1, 1944, until said employment was terminated on or about October 20, 1945, took no action whatsoever to terminate said contract dated March 15, 1944, or the second subcontract dated April 21, 1944, or to sue for the reasonable value of the services rendered, all as per the original contract of employment. To lull plaintiff into a sense of false security, defend-

ant McKelvy sent to plaintiff a copy of a letter dated February 13, 1945, addressed to the said Macris (copy attached as Exhibit G and by this reference thereto made a part hereof as though set out herein in full); but the original was never mailed to or received by the said Macris. Said letter of February 13, 1945, was written after defendant McKelvy made a personal inspection of said Macris' work on February 9, 1945, and in reply to a letter from the Macris to plaintiff dated January 27, 1945, copy of which is attached hereto as Exhibit H, and by this reference made a part hereof as though set out herein in full. Instead, said defendant McKelvy first counseled and advised plaintiff to complete the work which plaintiff did, though under protest, completing the work on or about April 8, 1945. Thereafter when plaintiff had completed the work, defendant McKelvy then advised plaintiff that the defendants Macri were at that time judgment proof and showed plaintiff a clipping from a Seattle newspaper reporting thefts by one, Stephen Macri from Macri Company, and stated to plaintiff that the report was untrue, but that plaintiff could no longer collect from Macris as they then had their assets hidden and McKelvy then suggested that plaintiff follow certain courses of action which in plaintiff's judgment would have been fraudulent as to creditors, and for this reason the advice was rejected by plaintiff; this was about October 15, 1945. Defendant McKelvy thereafter continued to delay taking any action whatsoever against the defendants Macri and the defendant

Continental Casualty Company, as requested by plaintiff, and purposely avoided keeping an appointment on October 18, 1945, whereupon plaintiff became concerned that the statute of limitations might be running out on him; and accordingly, on or about the 20th of October, 1945, plaintiff without any appointment confronted the defendant McKelvy and inquired of him as to what the applicable limitation period was, and was then informed that plaintiff had about one month left within which to file a suit. Also, at said conference on or about October 20, 1945, defendant McKelvy then informed plaintiff for the first time that he could not represent plaintiff in any action against the defendant Macri because the Macri Company was a good customer of Continental Casualty Company, and that Continental Casualty Company was one of the largest accounts of the law firm of which defendant McKelvy was a senior partner. Although not known to plaintiff until later, Continental Casualty Company had been for years before represented by the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann, and are now being so represented. Several other suits were filed in Yakima at or about the time plaintiff filed his suit in connection with which Willard Skeel of the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann represented defendant Continental Casualty Company in plaintiff's case, as well as other cases against Continental Casualty Company and Macri Company, as more fully appears from transcript of proceedings of plaintiff's case, copy attached as Exhibit I and

by this reference made a part hereof as though set out herein in full.

That all of the aforesaid acts and omissions by the defendant McKelvy were done intentionally and knowingly and as part of and in furtherance of the original conspiracy by the other defendants, and were designed and intended first to cause plaintiff to become bankrupt if possible, and secondly to cause plaintiff to be disgraced and disqualified in his personal and business reputation and credit, if he followed the advice given by defendant McKelvy, and that the aforesaid acts and omissions by the defendant McKelvy were part of a deliberate attempt to lead the plaintiff on through intentional stalls and delays to the point where plaintiff would be powerless to sue the said Macris because of the running of the statute of limitations; all of which was prevented only by the diligence of plaintiff; and that all of said acts were done knowingly, willfully and intentionally in concert with the other defendants and contrary to and against the interests of plaintiff, and as part of the aforesaid conspiracy.

E. Shortly after the 20th of October, 1945, plaintiff then retained the services of an attorney in Yakima, Washington, who promptly investigated the facts and then accepted the employment which Mr. McKelvy had originally accepted, and on or about the 1st of December, 1945, made a written demand upon the defendants Macri for the payment of sums allegedly due the plaintiff for the

performance of work under the subcontract dated March 15, 1944, and gave said defendants Macri until the 15th of December, 1945, within which to meet said demand, said notice stating that in the event of said defendants' failure to do so, suit would promptly be instituted for collection thereof.

F. In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff's alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff's credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.

G. That despite the filing of said malicious and totally unfounded suit in Multnomah County, Ore-

gon, plaintiff did file a suit in the Federal District Court in Yakima, Washington, under the Miller Act pursuant to letter dated August 10, 1945, from said Bureau of Reclamation, copy of which is hereto attached as Exhibit K, and by this reference made a part hereof as though set out herein in full; which suit was filed on or about the 20th day of December, 1945; and thereafter the defendant Continental Casualty Company then brought to plaintiff's attention for the first time (by contacting plaintiff's attorney Olson, see copy of letter attached as Exhibit L, which by this reference thereto is made a part hereof as though set out herein in full) the fact that the defendants Philp and Goerig were silent joint venturers with the defendants Macri and asked that the complaint be amended so as to name said defendants Philp and Goerig as additional parties defendant, which plaintiff did. Said Continental Casualty Company knew at all times the silent arrangements between the Macris and Philp and Goerig and the purported termination of some of the agreements (see Exhibits L and B). Said suit in the Federal District Court in Yakima was tried on the merits and finally resulted in a judgment in favor of plaintiff and against the defendants Macri, Philp and Goerig, and Continental Casualty Company, for what the trial court thought was the reasonable value of the services rendered by plaintiff under the contract dated March 15, 1944, and as part of the decision in that suit the subject matter of the aforesaid suit filed in Multnomah County, Oregon, on December

14, 1946, (which after much inconvenience plaintiff succeeded in having dismissed and which later became the subject of a cross-complaint and counterclaim by defendants against plaintiff in said suit filed in Yakima, Washington), resulted in a judgment in favor of plaintiff, and plaintiff was awarded nominal damages. Copy of the memorandum opinion of the trial judge and the judgment in said suit in Yakima are attached hereto as Exhibits M and N, and by this reference made a part hereof as though set out herein in full.

H. Said conspiracy was thereafter furthered by Defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars, to wit:

1. Continental Casualty Company led the way in the appeals of the trial court judgment and protected Defendants Macri from being precluded from appealing. On or about May 9, 1947, Continental Casualty Company filed its motion for new trial (copy of motion attached hereto as Exhibit O, and by this reference made a part hereof as though set out herein in full), which was overruled by Order of May 20, 1947, (copy attached as Exhibit P and by this reference made a part hereof as though set out in full). On May 20, 1947, Continental Casualty Company filed its notice of appeal and on July 29, 1947, Goerig and Philp filed their notice of appeal. Not until August 18, 1947, did said Macris file their notice of appeal, which date was beyond the time allowed to appeal and was attacked

by plaintiff's motion to dismiss, but the motion was denied on grounds that other defendants had filed timely, hence the Macris^s could come in. (Copy of Motion to Dismiss and Order of Appellate Court denying the motion attached hereto as Exhibit Q, and by this reference hereto made a part hereof as though set out herein in full.) On February 11, 1949, the Circuit Court of Appeals affirmed the trial court judgment and again Continental Casualty Company led the way on March 7, 1949, with a petition for rehearing. On March 10, 1949, the Macris filed similar petition. Transcript of proceedings in the Appellate Court is attached hereto as Exhibit R and by this reference made a part hereof as though set out herein in full. On April 5, 1949, the said Appellate Court by order (copy attached as Exhibit S and by this reference made a part hereof as though set out herein in full), denied the said petitions for rehearing and on the same day order staying issuance of mandate (copy of which is attached hereto as Exhibit T and by this reference made a part hereof as though set out herein in full), was entered as to Continental Casualty Company pending filing and determination of petition for writ of certiorari to be made by Continental Casualty Company. On May 14, 1949, Continental Casualty Company filed its petition for writ of certiorari and on June 20, 1949, the court announced that their writ was denied. On the same day, June 20, 1949, the Macris filed their petition for writ of certiorari, which was denied on October 10, 1949. On the same day,

October 10, 1949, Continental Casualty Company's petition for rehearing on the order denying their petition for writ of certiorari was denied.

All of said acts of separately appealing and delaying were done in furtherance of said conspiracy and were intended to bankrupt plaintiff and preclude his continuing prosecution of the case; and defendants nearly succeeded.

I. Finally, on or about the 9th of November, 1949, the draft issued by Continental Casualty Company in payment of the trial court judgment was delivered to plaintiff, but even then and in furtherance of the aforesaid conspiracy, language was intentionally included on the reverse of the draft immediately prior to the space for endorsement, intended to have the effect of preventing plaintiff from filing this suit and only after protracted negotiations and discussions did the bonding company finally consent to the deletion of the language objected to by the plaintiff. Neither Philp nor Goerig nor the Macris have yet paid to Continental Casualty Company the judgments obtained by Continental Casualty Company against them in plaintiff's suit in Yakima, Washington.

J. On or about the 16th day of August, 1950, Defendant McKelvy approached plaintiff at his office in Portland, attempting to collect the billing previously rendered for services purportedly rendered by Defendant McKelvy for plaintiff in the period from November 1, 1944, to October 20, 1945, again as part of the purpose to preclude plaintiff

from filing this lawsuit, said conference being brought on as a result of letter from plaintiff's attorney, Olson, to Macris' attorney (copy attached as Exhibit U, and by this reference hereto made a part hereof as though set out herein in full) advising in part, that Continental Casualty Company's appeal bond covered damages from delays on appeal and that plaintiff claimed substantial damages from these causes and contemplated filing suit for such damages. All of said conversation, conducted in the presence of two of plaintiff's employees, was immediately reduced to the form of a memorandum by plaintiff, copy of which is hereto attached as Exhibit V, and by this reference thereto made a part hereof as though set out herein in full. The letters and phone calls Defendant McKelvy represented to plaintiff that he made to plaintiff's attorney, Olson, were flatly denied by said Olson at a conference in his office with plaintiff on August 18, 1950, and Olson also at that time permitted plaintiff to examine his files and plaintiff found none of the letters or notes of conversation or alleged calls by Defendant McKelvy.

K. On October 4, 1950, plaintiff called said Olson to arrange a meeting to review rough draft of complaint in this damage action, but at that time Olson declined to represent plaintiff for the sole reason that McKelvy was to be made a party defendant.

VII.

That by reason of the premises aforesaid and all of the acts and omissions of defendants and each

of them in furtherance of their aforesaid preconceived and concerted plan and conspiracy and as the direct and proximate result thereof, plaintiff for several years thereafter had no personal credit whatsoever with which to conduct his business in Portland, and was able to survive in business at all only by one or more of his employees' employing their personal credit, which was nominal in amount, with which to obtain the materials and conduct his business; that plaintiff suffered severe financial losses as a result of the consequent great curtailment of his said business activities. Plaintiff also suffered severe damage to his reputation, and suffered severe mental anguish. Plaintiff also by reason of the aforesaid conspiracy and acts of defendants in furtherance thereof was prevented from perfecting, developing and marketing certain inventions relating to improvements in tools and methods used in the concrete and construction business, all of which would otherwise have been perfected and marketed at a substantial profit to plaintiff, all to plaintiff's damage in the sum of One Million (\$1,000,000.00) Dollars.

Wherefore, plaintiff prays that he have judgment against defendants, and each of them in the sum of One Million (\$1,000,000.00) Dollars.

/s/ M. C. SCHAEFER,
Plaintiff.

EXHIBIT A

Performance Bond

(Construction or Supply)

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-five thousand and 00/100 (\$65,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the

surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its under-signed representative pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ DON MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ JOE MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY
COMPANY,
(Corporate Surety)
Box 534, Yakima,
Washington.

By /s/ CLYDE E. PHILP,
Attorney in Fact.

Attest:

ELLA HOLT.

Payment Bond

(Construction)

Pursuant to the Act of Congress,
Approved Aug. 24, 1935
49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri, and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-four thousand two hundred seventy-five and 48/100 (\$64,275.48) dollars for the pay-

ment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] /s/ DON MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

[Seal] /s/ JOE MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY
 COMPANY,
 (Corporate Surety)
 Box 534, Yakima,
 Washington.

[Seal] By /s/ CLYDE E. PHILP,
 Title: Attorney in Fact.

Attest:

 ELLA HOLT.

The rate of premium on this bond is xxxxx per thousand.

Total amount of premium charged, \$ premium included in performance bond.

EXHIBIT B

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

1. A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

2. Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

3. Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels, Roza Division, Yakima Project, Washington.

4. Earthwork, pipelines and structures, Laterals

70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

5. The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, 1, 2, 3, 4, and 5, are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

1. It is understood that in reference to the first four contracts or projects referred to hereinbefore,

the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result $52\frac{1}{3}\%$ thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

2. As to Project 5, this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection there-

with, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. (39)

3. Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for the first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project 5, as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project 5.

4. In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project 1, known and designated as "Val Vue Real Estate Development."

5. It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That sec-

ond parties upon Project 5 are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00 is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

6. It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. (40)

7. It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not

allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

8. It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

9. In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, con-

currently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By DON MACRI,

One of Said Firm, But Authorized to Act in This Matter for It, First Party.

CLYDE PHILP,

A. J. GOERIG,

Individually and d/b/a Goerig & Philp and/or A. J. Goerig Construction Co., Second Parties.

[Endorsed]: Filed July 5, 1946. (42)

EXHIBIT C

We, Wm. E. Schaefer and M. C. Schaefer, had an appointment with Sam Macri for 10:00 a.m., 4-28-44, at the job office. Macri did not show up. George Staples, Superintendent for Macri & Company, came in from the field in the afternoon. M. C. Schaefer asked him to locate Macri. Staples called Seattle but did not reach Macri and the Seattle office did not know where he was. Staples then said, "I believe Macri is going to quit interfering with

my program, forcing me to lay off men, saying you've got too many men, the pay roll is too big, lay them off, and if he doesn't, I don't think I'll be here long, and I'm going to put on sufficient help and see that the excavating will be done according to specification."

M. C. Schaefer said, "That's not enough. You get hold of Macri and see that he shows up tomorrow before noon or we'll start gathering our equipment and pull off the job starting at noon."

Staples said, "Don't do that, Matt. In the future I'll see that you don't have to wait for anything. I'll get in touch with him." He then called Yakima and talked to Macri.

The next day Macri, W. E. Schaefer and M. C. Schaefer met at the office and drove to the field. We stopped at Structure #18. Fred Waltie (our superintendent) and George Shular, a form setter, were excavating. M. C. Schaefer had them stop excavating. Waltie then sent Shular to the yard to work. Waltie then came with us to check the excavations. We checked approximately 6 or 7 holes and they were all off.

Macri said, "Well, we are just getting started. You've got to expect some of this at the start, and you are supposed to do some grading .2 or .3."

M. C. Schaefer said, "Oh, no, we don't have a thing to do with it, but you are trying to shove it onto us, and that's what we're here about."

Macri said, "All right, we'll get the excavating right from now on." Turning to Staples he said, "You get the men in here and get this grading

done." Then looking at M. C. Schaefer said, "Or you go ahead with it and I'll pay you for it."

M. C. Schaefer said, "Now just a minute. You know better than that. You get your men in here and see that these holes are excavated per plan and specifications, and that means out 1 foot and on a 1:1 slope, and have sufficient men and equipment here to do it. You told us you would have plenty of equipment and men on the job so that we could go as fast as we wanted to, and here we are killing time laying out for fine grades, excavating, grading, cribbing, backfilling, rebuilding dried-out forms, etc., and not only that but: What are we going to do next week? You get down to business and excavate these holes to the specifications."

Macri said, "You take the excavating item, then you handle it."

M. C. Schaefer said, "No, but if we were doing it, we'd watch our cut banks and elevations and not only excavate out a foot and on the 1:1 slope, but would pull out a couple extra shovelfuls here and there so the finegraders in trimming the cut banks and fine grading could semi-shove the excavating material into these extra pockets instead of shoveling up on a bank and having the carpenters kick it back into the hole. I'll say the total excavating cost for structures would be less if the excavating were done per specifications than the hand work alone is costing now."

Macri said, "We haven't got the men. This little grading don't amount to anything. Keep track of it, and I'll pay you for it."

M. C. Schaefer said, "That's not all you are going to pay for. You're going to pay for all the extras. What do you think we are? Who do you think is going to pay the extra cost of placing these forms, of stripping them out of such holes as this, wrecking them, and having to haul all the forms back to the yard for repair instead of to structures ahead. We're going no further. If your performance doesn't change, we'll just pull out."

Macri said, "All right, quit arguing. We'll get more men in here, and I'll get another shovel on the job, and we'll get excavations right, and we'll keep out of your way. I'll pay you all extras then, so keep going." He then turned to Staples and said, "Get men in here and get this work fixed up." Staples then left to lay out holes for the shovel.

Back at the office later, M. C. Schaefer said to Staples, "Now what will these promises amount to."

Then Staples said, "Now that's it. Macri passes it onto me. Out in the field he said, 'We will get things on the button,' then he told me later, 'Keep going as you are. Let them excavate .2 or .3,' and Matt, I'm getting tired of it. I knew yesterday where to reach him, but he said for me not to call him unless I had to. Well, when you said you were going to pull out, I had to get in touch with him. I don't know what to think. Macri is paying my salary, but this buck passing isn't a part of our deal. On the other hand, stick with it. I'll get more men on and get things working as they should or Macri will have to lay me off. I'll not quit. I'll work it out, or he'll have to lay me off."

EXHIBIT D

We, Allyn R. Hunter, Fred Waltie, and M. C. Schaefer, had an appointment with Sam Macri 6-15-1944 at the job office.

We then drove to the field to check the excavations, the conditions of the set forms, etc. Present were Sam Macri, Mr. Cohn, Macris' Engineer; Allyn R. Hunter, Rogers Insurance Agency, Fred Waltie, our Superintendent, and M. C. Schaefer.

M. C. Schaefer pointed out the different errors in the excavating work, the condition of the set forms, etc.

Macri said, "That's nothing to holler about. We just got started here. The rest are better, and we'll get them o.k. from now on."

M. C. Schaefer said, "You point out any that are better." So we went on to check more holes, none were better, but some were worse. M. C. Schaefer pointed out where we had set the outside forms so that Macri's crew would know where to crib and backfill and where they had so backfilled.

M. C. Schaefer said, "This is backfilled, and the backfill is not puddled, who is to take the responsibility of cracked structures due to such backfilling?"

To which Macri replied, "That's not for you to say. That's up to the inspector."

M. C. Schaefer said, "Yes, but I sure expect to hear about it if the structure cracks. That's a minor detail. The real thing is, when are you going to get these excavations to specification, and I mean excavated out 1 foot and on the 1:1 slope.

The way these holes are excavated the slow progress and absolute lack of cooperation on the part of Sam Macri & Company is making our work cost, if continued in the same way, in excess of twice our bid price. Now just when are you going to get men in here and get going? We are tied up now without anything to do on account of there being no holes ready and no material, and we are paying a couple of men so as not to lose them."

Macri said, "Well, you take the excavating item."

M. C. Schaefer said, "No, but as I told you before, if we were doing it, we would watch our cut banks and elevations and excavate per specification, which is out 1 foot and on a 1:1 slope. Plus that, we'd excavate a bit more, if anything, so as to give room for the hand excavators to semi-shove the small amount of hand excavated material then required to be excavated to a side instead of shoveling up on a bank for the carpenters to kick back into the hole again and for the strippers to dig out before they will be able to get the forms out. And I'll say it again, I believe the total excavating then would cost less than the hand excavating alone is costing now."

Macri said, "You are supposed to do a little grading .2 or .3."

M. C. Schaefer said, "Here we go again, the same old argument, the same old promises over and over again. We don't have a thing to do with it! You better get all that equipment you've been promising for so long in here and the necessary men. I've asked that you have clear sailing ahead for us so we can

pour at least 20 cubic yards of concrete per day, and I mean every day, and that means at least 80 structure excavations ahead of our pouring crew."

Macri said, "All right, we'll get the excavating right from now on. We'll have an engineer on the job Monday, and we'll get necessary material on the job. So get back and go to work."

M. C. Schaefer said, "Not yet we won't. You get plenty of holes ahead first. Your Superintendent in his letter to us before we figured the job said you would be ready for concrete in about two weeks, and here we are tied up like this."

Macri said, "Yes, you told me Staples was a good man, and he can't handle it."

M. C. Schaefer said, "I've never said anything of the kind, but if he had had a little cooperation from you, he probably would have done better by far."

Macri said, "I'll have an engineer on the job Monday, so quit arguing. We'll get going."

M. C. Schaefer said, "When will you get these holes cleaned up and re-excavated per specification? If not soon, you will be doing the forming and concrete work yourself. This expensive operating is at an end right now. You're going to have a big extra bill so far."

Macri said, "I told you I will pay for the extra excavating."

M. C. Schaefer said, "Extra excavating—you're paying for all the extras."

Macri said, "All right. I'll pay all extras. Nobody will lose money on my job. I told you that

fied pipe layer. You are requested to immediately resume pipe laying operations with a sufficient force of qualified pipelayers so as to insure completion of this work during favorable weather conditions.

“We cannot accept labor conditions as a prime cause of these delays for the reason that all of our other contracts now in force are ahead of schedule. We have been advised that a considerable part of these delays are due to protracted negotiations with prospective sub-contractors rather than to an aggressive prosecution of the work.

“Very truly yours,

“H. T. NELSON,

“Construction Engineer.”

EXHIBIT F

The following is a photostatic copy of an office memo, consisting of four pages, from Mr. McKelvy to Mr. Kelly of their office.

November 8, 1944.

Mr. Kelley:

Re: Concrete Construction Co. -
M. C. Schaefer, Subcontractor,
Roza Project, Yakima.- Macri & Co., Contractors.

*not here
just
schedule
specification*

Attached are Subcontracts and Contracts Nos. 1 and 2. Mr. Schaefer subcontracted the concrete work on the Roza Division, Yakima Project. No work has as yet been started on Contract No. 2. Contract No. 1 is about one-third completed. The contract terminates on February 8, 1945.

The nature of work being performed is pouring the concrete in building diversion channels and other structures in connection with this Reclamation Project. Macri & Company, general contractors, does the work ahead of the concrete work, so that the speed of the subcontractor is governed by the general contractor.

Schaefer, representing Concrete Construction Company, claims that it is impossible for him to continue with the work; that he has already lost a lot of money; that it will be impossible to complete the work by February 8, due to the fact that the concrete work cannot be done in cold weather, and claims that the reason he has lost money on the job is that Macri & Company has breached its agreement in the following respects:

*being in
tract
this?*

*into...
to furnish
no-employment
and or a factory
ity?*

*Contractor
get on
from
mer?*

*one does
tract
this
does?*

1. The excavating is being done in a haphazard manner and not according to specifications, making it necessary for Schaefer to excavate before doing his part of the work, at considerable expense; *perhaps this would constitute performance being prevented by acts of adverse party*
2. Macri furnishes very poor lumber, -apparently lumber used on other contracting jobs;
3. Macri has failed to put enough *see above - same reason* equipment on the job to keep excavation ahead of Schaefer, with an ordinary crew;
4. Schaefer has not been paid until very late; has still not received his pay for September. (See Article 2 of Sub-contract in this connection.); *Good Grounds -*
5. Macri has failed to construct roads so that Schaefer can get equipment around. Schaefer is bonded on Contract No. 1 but is not bonded on Contract 2, which has not yet been commenced. *bonded to Macri & probably notice should be sent owner?*

The evidence which Schaefer has concerning Macri's acts is not specific and satisfactory; nevertheless Schaefer insists that he must collect or go broke. He has had a number of meetings with Macri and the Project Engineer, but nothing has been accomplished.

E.O.Y

Cancel & ask quantum meruit recovery *and loss sustained by others*



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-2-

In effect, Schaefer now wants to know how he can throw up these contracts and best protect himself?

Probably Schaefer should notify Macri & Company that he is not going to proceed with the work, outlining various reasons. Also, we should consider the advisability of bringing suit on Contract No. 1 for past and future damages.

Mr. Skeel should call Mat Schaefer, Portland (Lanier 4181) and give him our tentative ideas at least on what we think he should do.

McK.

D.

6

waves of 1902

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Re Arbitration Rule
~~see~~ Morison et al safe Co
 case
 81 W 592

06 W 254 - Bishop v Ryan Construction Co.
 Refusal to make a monthly payment
 re for hauling on county road work, to
 determine the amount due, constitutes
breach of the contract, warranting a
rescission.

Failure to immediately cancel a
 contract upon non-payment was not
warranted of the right - party could so
 cancel at any time up to time other
 party offered to make such payment.

130 W 348 Francis v Hoard
 Party guilty of first breach of contract
 may be deprived of benefits therefrom, such as profits

71 Pac (2) 30 (wash) Russell v Stephens
 our Supreme Ct differentiates between
 "rescission" and "termination by breach"
 "Breach" allows action for damages against
 defaulting party. 5 Page on Contracts # 2878, 3073
 # 3024, # 3027
 also 3 Wellston # 1301-1303, pp 2351-55



1. call attention to breach
- 2.

2.

2. My reason ^{these} about us alone we
are entitled to know & refuse to
play & receive our cards & pocket

3. Pull of wire &

- 4 types for arthropods on

7 tender for
~~light~~ enough me entitled
 to a ~~rest~~ rest & unless if
 they have been in a ~~fracture~~

if a song

EXHIBIT G

February 13, 1945.

Macri Construction Company,
905 10th Ave. So.,
Seattle 4, Washington.

Attention: Mr. Sam Macri

Dear Mr. Macri:

Mr. Matt Schaefer of the Concrete Construction Company has furnished me with an itemized breakdown of his costs already incurred in connection with Contract No. 12r-14825, Specification No. 1062, United States Reclamation Job, Roza Division, Yakima Project, Washington, which cost figures I am herewith transmitting to you. You will note that these are itemized by the month, each page representing a separate month, from March, 1944, to January, 1945, inclusive, together with a recap sheet.

Mr. Schaefer also advised me the other day that he had not yet received a check for his December work from you. Possibly this has already been forwarded to him by this time.

With reference to your letter of January 27, 1945, addressed to the Concrete Construction Company on the above matter, wherein you advise the Concrete Construction Company that you will charge any penalty assessed by the United States against you to such company, please be informed that our investigation discloses that you have not completed your own work as required under your contract with

the United States Bureau of Reclamation in regard to the above project. This work of yours which has not been completed as of this date by you has prevented and is preventing the Concrete Construction Company from finishing up its subcontracting work. Under these circumstances the Concrete Construction Company will therefore refuse to accept your attempt to charge a penalty to that company, which penalty, if any be assessed, would be due to your own failure to comply with the original contract and the subcontract.

In connection with the second subcontract No. 1068, Roza Division, Washington, United States Reclamation Job Specification No. 1068, to which you refer in your letter of January 3, 1945, it appears that you have likewise failed to comply with the provisions of said subcontract.

An investigation of the excavations made by you with reference to such second subcontract, such investigation being made on February 10, 1945, discloses that all of such excavations have been made in a manner contrary to the specifications of such contract and subcontract. Such specifications provide substantially that an allowance of one foot outside of the outside wall is to be made entirely around the structure, including head walls, and back slopes of 1:1 are to be allowed all the way around from one foot outside of the structure to the ground surface.

This has not been done in any of the excavation

work in connection with such subcontract No. 1068 and the excavation has been made sheer on virtually every wall, with little or no allowance, making it impossible to construct forms therein and to do the necessary work preparatory to pouring concrete. This is the same type of defective work that you did in connection with all of the excavation on Contract No. 1062 and the subcontract in connection therewith, which made it impossible for the Concrete Construction Company to proceed with Contract No. 1068 and the subcontract therewith.

At this time, therefore, by reason of such faulty excavation in connection with your work on Contract No. 1068 and the subcontract therewith, Concrete Construction Company hereby declares that you have breached the provisions of said subcontract No. 1068 and said Concrete Construction Company therefore holds you in default and declares the forfeiture of such subcontract by reason of your breach thereof.

Yours very truly,

W. R. McKELVY.

WRM:MW

Encl.

EXHIBIT H

January 27, 1945

Concrete Construction Co.

Re: Subcontract No. 1062, Roza Division,
Washington; U. S. Reclamation Job
Specification No. 1062

Gentlemen:

This is to advise you that under the terms of our principal contract all work is to be performed and completed within four hundred days after December 29, 1943. You are therefore advised that any failure to complete your subcontracted work will result in a charge to you of any penalty for delay that may be asserted against us by the United States on account thereof.

A copy of this communication has been mailed to your surety, Glen Falls Indemnity Company, care of Mr. R. F. Owen, Spalding Building, Portland, Oregon.

Very truly yours,

MACRI & COMPANY,

By SAM MACRI.

SM/WW

Registered—Return rec. requested.

EXHIBIT 1

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-partners Doing Business as MACRI
COMPANY, and CONTINENTAL CAS-
UALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; the Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant,

Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: (2485)

* * *

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. (2486)

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying (2487) is the same bank all the time, your Honor, Seattle First National Bank.

(Testimony of A. J. Goerig.)

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I know about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his (2488) own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identifications, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? (2489) A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it stricken.

(Testimony of A. J. Goerig.)

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I (2490) don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact

(Testimony of A. J. Goerig.)

that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the (2491) best evidence; it is not competent evidence.

(Testimony of A. J. Goerig. Mr. Hawkins, continued.)

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plain-

(Testimony of A. J. Goerig.)

tiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore (2492) it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

(Testimony of A. J. Goerig.)

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with these jobs?

A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. (2493)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with these jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your atten-

(Testimony of A. J. Goerig.)

tion. Where (2494) did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the material men, laborers, or otherwise, on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the material men or the plaintiffs in this case ever knew (2495) about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

(Testimony of A. J. Goerig.)

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macris' Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company? Obligation for the performance of those jobs, to be——

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it. (2496)

Mr. Holman: May I restate the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

(Testimony of A. J. Goerig.)

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the (2497) objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp?

I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on

February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

EXHIBIT J

(Summons typed on blank No. 190)

In the Circuit Court of the State of Oregon for the
County of Multnomah

166476

SAM MACRI, JOE MACRI and DON MACRI,
a Co-Partnership, Doing Business Under the
Assumed Name and Style of MACRI COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Busi-
ness Under the Assumed Name and Style of
CONCRETE CONSTRUCTION COMPANY,

Defendant.

SUMMONS

To: M. C. Schaefer, a sole trader doing business
under the assumed name and style of Concrete
Construction Company, Defendant

In the Name of the State of Oregon:

You are hereby required to appear and answer
the complaint filed against you in the above-entitled

action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiffs will take judgment against you in the amount of \$40,000.00, together with interest thereon at the rate of 6% per annum from January 3, 1945, and their costs and disbursements incurred herein.

MAGUIRE, SHIELDS &
MORRISON,
JAMES G. SMITH,
Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah—ss.

I, James G. Smith, one of the Plaintiffs' Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 14th day of December, 1945.

/s/ JAMES G. SMITH,
Attorney for Plaintiff.

By.....,
Deputy,
.....,
Sheriff.

In the Circuit Court of This State of Oregon for the
County of Multnomah

No. 166476

SAM MACRI, JOE MACRI and DON MACRI, a
Co-Partnership, Doing Business Under the As-
sumed Name and Style of MACRI & COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Business
Under the Assumed Name and Style of CON-
CRETE CONSTRUCTION COMPANY,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action
against the defendant, complain and allege as fol-
lows:

I.

That during all times hereinafter mentioned, the
Plaintiffs Sam Macri, Joe Macri and Don Macri
have been and now are co-partners doing business
under the assumed name and style of Macri &
Company with principal place of business at Seattle,
King County, Washington, and with all said part-
ners being residents of said City, County and State.

II.

That during all times hereinafter mentioned the
defendant, M. C. Schaefer, was a sole trader doing

business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

III.

That heretofore and on or about the 18th day of May, 1944, the Plaintiffs entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines and structural laterals and sub-laterals, Roza Division, Yakima project, Washington, according to the terms and specifications in said contract contained and provided, and particularly in accordance with said Specifications No. 1068.

IV.

That the said contract above referred to provided that the Plaintiffs might enter into sub-contracts in carrying out the provisions of said contract No. 12r-14996, and on or about the 21st day of April, 1944, the Plaintiffs entered into a written sub-contract with the Defendant, M. C. Schaefer, dealing as a sole trader under the assumed name and style of Concrete Construction Company, by the terms of which said sub-contract the said Defendant agreed to furnish all labor, and necessary equipment to do all the concrete work, form work, cut, bend and install all reinforcing steel; and to strip and clean all concrete forms, remove nails from same and pile

same in neat piles, all in accordance with the plans and specifications as set forth in said Specification No. 1068, Roza Division, Yakima Project, Washington; that a true, full and complete copy of said sub-contract entered into by said Plaintiffs and the said Defendant, M. C. Schaefer, is hereto attached, marked Exhibit "A," and by reference made a part of this complaint.

V.

That said sub-contract entered into by and between the Plaintiffs and the Defendant as aforesaid, provided that:

"Time being the essence of this Contract the Sub-contractor shall prosecute his work with a diligence and to the utmost of his ability and in a workman-like manner."

Said contract further provides:

"Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

"Coordinate the work covered by this agreement with that of all other sub-contractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other sub-contractors to facilitate the completion of the entire work. The sub-contractor shall be governed by such orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The

sub-contractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all contractors, sub-contractors and material men. If the subcontractors shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the subcontractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work.

VI.

That thereafter, on or about the 30th day of November, 1944, the Plaintiffs directed the Defendant to commence performance of the work called for under said sub-contract, such order having been given by letter, a full, true and correct copy of which is hereunto attached, marked Exhibit "B" and by this reference made a part of this complaint.

VII.

That the Defendant failed, neglected and refused

to commence performance of said work provided for by said sub-contract when directed to do so by the Plaintiffs and failed to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of the Plaintiffs as principal contractor as required by the terms and provisions of said sub-contract, and continued to fail, neglect and refuse to perform said work or any part thereof.

VIII.

That on the continuing failure of the Defendant, M. C. Schaefer, to carry on the performance of his said sub-contract and to coordinate the work provided for thereunder with the work of the other sub-contractors and of the principal contractor, the Plaintiffs, on the third day of January, 1945, notified the Defendant in writing that he was in default and that the Plaintiffs would take over and perform at Defendant's cost the work described in the said sub-contract; a full, true and complete copy of said notice marked Exhibit "C" is attached hereto and by this reference made a part hereof.

IX.

X.

That thereafter the Plaintiffs herein did take over and now have fully performed the work provided by the sub-contract between the Plaintiffs and the Defendant; and likewise the Plaintiffs have now fully and completely performed the principal contract No. 12r-14996.

XI.

That the Plaintiffs have fully kept and performed all the terms and conditions of their said sub-contract with the defendant on their part to be kept and performed.

XII.

That by reason of the failure of the Defendant to perform the work agreed to and provided for by the terms and conditions of said sub-contract and by reason of his failure to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of Plaintiff as principal contractor; and by reason of his default under said sub-contract and his breach thereof, the Plaintiffs herein suffered damages in the amount of \$40,000.00.

XIII.

That there is owing by the Plaintiffs to the Defendant an amount not in excess of \$1,449.87 by reason of defendant's performance of a sub-contract entered into by and between the Plaintiffs and the Defendant in connection with the performance by the Plaintiffs as principal contractor of certain work under Contract No. 12r-14625, Specifications No. 1062, Roza Division, Yakima Project, Washington; and Plaintiffs are now willing that all amounts which Defendant is entitled under said sub-contract may be deducted from any amount to which Plaintiffs may be entitled under the allegations of Plaintiff's complaint herein.

Wherefore, Plaintiffs pray for judgment against the Defendant M. C. Schaefer for the sum of \$40,-

000.00, together with interest thereon at the rate of 6% per annum from the 3rd day of January, 1945, and for their costs and disbursements herein.

TOM W. HOLMAN,
MAGUIRE, SHIELDS &
MORRISON,
Attorneys for Plaintiffs.

EXHIBIT K

“This will supply the information requested in your call to this office on August 8 concerning the procedure to be followed in connection with claims against contractors holding bonded government contracts.

“Accounts for services or materials that are definitely related to this contract are fully protected by a payment bond which the Government contractors are required to execute. The Government does not participate directly in the settlement of such accounts, but the provision of the bond become available in the event that a suit becomes necessary.

“The procedure in cases of this kind is as follows:

‘Under the Act of August 24, 1935 relating to payment bonds, a sub-contractor or material man may file suit after the expiration of 90 days from the day the last labor was done or material furnished, and within one year from the date of final settlement. A person who has no direct contractual relationship with the contractor

must notify said contractor of his claim within the 90-day period by registered mail. For a complete description of details and procedure, you are referred to the act which is printed in 49 Stat. 793, 40 U.S.C.A., 270(a) etc.'

"The Macri Company was bonded by the Continental Casualty Company, P.O. Box #586, Yakima, Washington. It is suggested that the bonding company as well as the Macri Company, be notified of the account by registered mail."

EXHIBIT L

"As yet there has been no appearance by any of the Defendants in either of the cases here but I have just secured some information which will probably make it desirable for us to file an amended complaint. I have learned that a Mr. Clyde Philp and Mr. A. J. Goerig of Seattle had entered into a joint venture agreement with the Macris under which agreement they were to share in the profits and losses of this transaction, and my information is that both of these gentlemen are very much financially solvent while the financial position of the Macris may or may not be so good. I would like to hear from you as to whether or not Mr. Schaefer had any knowledge or information as to the connection of Mr. Philp and Mr. Goerig with this transaction or whether they were entirely silent partners as far as he was concerned. My informa-

tion is also that the joint venture agreement was entered into in December of 1943, and that in July of 1944 another agreement was entered into under which the joint venture agreement was attempted to be terminated.

“* * *Confidentially and for your information, the source of my information as to the joint venture is from the bonding company in this case, which, of course, is anxious to have some solvent defendants added to the case, but I have assured them that neither of us would reveal to the Macris or to Mr. Philp or Mr. Goerig the source of our information. * * *”

EXHIBIT M

COURT'S OPINION

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on subcontract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain mate-

rials that were listed in the subcontract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any subcontracting of a part of this work. They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from (2451) the base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the subcontractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the subcontractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be (2452) reasonable. The Reclamation Bureau, with its long experience in construction of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macris' hoe-type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macris' superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that

way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in (2453) the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer bank the shiplap, which I assume would be approximately an inch thick, less whatever is planed down, the two-by-fours forming the framework, and then what's been referred to, I think, as the strong-backs, an additional two-by-four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called shebolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the subcontractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and

specifications, that it was defectively and improperly done, and that in most instances the carpenters had to do the fine grading before they could install the forms, and that that also increased (2454) the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so as to enable the subcontractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the subcontract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two-by-fours or the shiplap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent

in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and took the invoices at the direction of somebody (2455) else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was wilful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach on Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job,

and Mr. Macri (2546) had notice of these complaints. He had notice and knowledge of his failure and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all his costs. I think such a finding would be inconsistent with the other testimony in the case here, and (2457) with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading

and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, (2458) 65 F. Supp., page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these

cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in *Susi vs. Zara*, that where the contract is breached by the main contractor, the subcontractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The *Susi* case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never (2459) completed by the subcontractor, and the question was not decided as to whether the subcontractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price provided in the subcontract. In the *Susi* case, the

main contractor took over the contract when it was partly performed, and made it impossible for the subcontractor to complete it, and the court held that the subcontractor could recover for the reasonable value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the subcontractor is entitled to recover on that basis against the bonding company also. (2460)

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what the Supreme Court of the State of Washington I think has indicated as its view in cases of this

character. In McDonald vs. Supple there was a government contract to construct dredges by the subcontractor, parts and materials to be furnished by the main contractor. The subcontractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount (2461) and value of the work to be done by the subcontractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner; they were defective; the subcontractor had to have a large crew of skilled workmen standing by; they couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

“The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant.”

And again on page 318:

“The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition

agreed upon. Therefore the plaintiff could properly recover on quantum meruit."

(Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

"Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through."

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say, too, of course, that the bonding company was not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work,

that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.

Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the subcontract to their benefit, where the reasonable value of the work and services under the (2464) circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's Exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the

view of the court is he's not entitled to interest prior to the date of judgment. \$57,618.87, and from that I think should be deducted the legal expense of \$533.57, and the engineering expense of \$201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established (2465) business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow \$57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances,

that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of (2466) whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from *Corpus Juris*, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the busi-

ness, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Macri with the government on 1062,

and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then (2468) was to just ascertain the extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement

terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied (2469) contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment (2470) against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were discussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement (2471) as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the

amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the circumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty-seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never (2472) been any excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evi-

dence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. (2473)

(Argument by Mr. Olson.)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as final and controlling importance. I think

the conversations, taken with the continuing breach by Mr. Macri, and his conduct, give rise to a situation where Mr. Schaefer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll get over these, and I don't want (2474) to rehash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. (2475)

EXHIBIT N

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. Schaefer, an Individual Doing
Business as Concrete Construction Company,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-Partners Doing Business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause having come on duly and
regularly for trial before the Hon. Sam M. Driver,
Judge of the above-entitled Court, on the 24th day of
February, 1947, the use Plaintiff, M. C. Schaefer, an
individual, doing business as Concrete Construction
Company, appearing in person and by his attorney,
Harry L. Olson, of Olson & Palmer, and the Defend-
ants Sam Macri, Don Macri and Joe Macri appear-
ing by Sam Macri, and each of said Defendants
Macri appearing by and being represented by their
attorney, Tom W. Holman of Brethorst, Holman,
Fowler and Dewar, and the Defendants A. J. Goerig

and Clyde Philp appearing by A. J. Goerig and their attorney Kenneth Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company, appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and written briefs filed in the matter, and the (82) Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners, doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of \$921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of \$1,750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of \$none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals, doing business as Macri Company, for the sum of \$1.00 damages as to Specifications 1068 which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri, against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States

of America under its certificate of levy, copy of which was received in evidence as Macris' Exhibit 67. (83)

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. (84)

EXHIBIT O

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:

1.

That judgment was not sustained by substantial evidence.

2.

That judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of \$2,656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of \$2,656.46. (85)

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,

Attorney for Defendant,

Continental Casualty Co.

[Endorsed]: Filed May 9, 1947. (86)

EXHIBIT P

ORDER DENYING MOTIONS FOR NEW TRIAL

The above-entitled cause having come on regularly for argument on the 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above-entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in open court this 20th day of May, 1947.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. (87)

EXHIBIT Q

In the United States Circuit Court of Appeals
for the Ninth District

No. 11707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual Do-
ing Business as CONCRETE CONSTRUC-
TION COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-Partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

MOTION TO DISMISS APPEAL OF
CROSS-APPELLANTS MACRI

Comes now the Appellee, M. C. Schaefer, an in-
dividual, doing business as Concrete Construction
Company, and moves the above-entitled Court for
the following order:

1.

That an order be entered, dismissing the appeal

of the Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; this motion to dismiss is made upon the grounds and for the reason that said Defendants and Cross-Appellants failed to serve and file their notice of appeal timely, as required by 18 U.S.C.A., Section 230, and is based upon the transcript of the record, heretofore filed in this Court, and upon the affidavit of Harry L. Olson, hereto attached and made a part of this motion.

2.

The facts, objects and points, concerning this motion to dismiss, are as follows: That upon the 1st day of May, 1947, Findings of Fact, Conclusions of Law and Judgment were entered in said case, and no motion for a new trial was ever made, for or on behalf of the said Defendants and Cross-Appellants Macri; that on the 9th day of May, 1947, Defendant and Appellant, Continental Casualty Company, interposed a motion for a new trial; that on the 12th day of May, 1947, Defendant and Cross-Appellants, A. J. Goerig and Clyde Philp, interposed a motion for a new trial; that thereafter, on the 20th day of May, 1947, an order denying both of the above motions for a new trial was entered by the District Court; that upon the 16th day of August, 1947, the Defendants and Cross-Appellants Macri served and filed their notice of appeal to the above-entitled Court. That said notice of appeal was served and filed 110 days after the entry of said Judgment, and that Appellants Macri, not having

interposed a motion for a new trial, it is the position of the Appellee herein, that the time for appeal, as for the Cross-Appellants Macri, began to run upon the entry of the Judgment, and was not suspended by the motions for a new trial, interposed by the other Defendants herein.

3.

An authority for the position of the Appellee that the notice of appeal of the Cross-Appellants Macri was not timely, Appellee cites the following authorities: Denholm and McKay Company vs. Collector of Internal Revenue, 132 Fed. (2D) 243; Alexander vs. Special School District of Boonville, 132 Fed. (2D) 355; Tinkoff vs. West Publishing Company, 138 Fed. (2D) 607; Bowles vs. Rice, 152 Fed. (2D) 543; Morrow vs. Wood, 126 Fed. (2D) 1021; Safeway Stores, Inc., vs. Coe, 136 Fed (2D) 771; 26 U.S.C.A. 230.

Dated this day of December, 1947.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Appellee,

M. C. Schaefer.

AFFIDAVIT OF HARRY L. OLSON

State of Washington,
County of Yakima—ss.

Harry L. Olson, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for Appellee, M. C. Schaefer, doing business as Concrete Construction Company, and makes this affidavit in support of the motion to dismiss the appeal of Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; that the Judgment, Findings of Fact and Conclusions of Law in the above-entitled case were signed by the Court and entered upon May 1st, 1947; that no motion for a new trial was ever made for or on behalf of the Defendants and Cross-Appellants Macri; that the Continental Casualty Company served and filed a motion for a new trial upon the 9th day of May, 1947; that A. J. Goerig and Clyde Philp served and filed a motion for a new trial on May 12th, 1947; that the District Court signed and entered an order denying said motions for a new trial, interposed by the Appellants, Continental Casualty Company, and Cross-Appellants, A. J. Goerig and Clyde Philp, on May 20th, 1947; that the Cross-Appellants Macri served and filed their notice of appeal to the Circuit Court of Appeals on August 16th, 1947.

HARRY L. OLSON.

Subscribed and Sworn to before me this day
of January, 1948.

.....,

Notary Public for Washing-
ton, Residing at Yakima.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-Partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

March 31, 1948

Upon Appeals from the District Court of the
United States for the Eastern District of
Washington, Southern Division

Upon motion to dismiss appeal of Macri, et al.

Before: Denman, Healy and Bone,
Circuit Judges.

Denman, Circuit Judge:

The United States, as use plaintiff for one Schaefer, sued Sam Macri, Don Macri, Joe Macri, A. J. Goerig, and Clyde Philp, individuals and co-partners doing business as Macri Company, and Continental Casualty Company, a corporation, upon a claimed non-performance of contract between the United States and Defendants Macri Company for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sublaterals Roza Division, Yakima Project, Washington, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95. The Continental Casualty Company was joined as surety for the Macri Company's performance of the contract. Judgment on this contract was entered against the three Macris and the Continental Casualty Company jointly and against each of them.

The complaint also alleged non-performance of a subcontract of the Macris' Company on the same job. Judgment was entered against them alone on this count. The complaint against the other two partners was dismissed.

The Continental Casualty Company claimed against the three Macris on their contract to hold it harmless on its surety bond. Judgment was entered against the Macris for the amount the Continental Casualty Company was held liable to the plaintiff and for its attorneys' fees. This judgment was not made conditional on the non-payment of the judgment by the Macris.

The three Macris also cross-complained against the plaintiff. Judgment was entered dismissing the cross-complaint. The three Macris also cross-complained against Goerig and Philp. Judgment was entered dismissing this cross-complaint. Goerig and Philp cross-complained against the three Macris. Judgment was entered dismissing this complaint. All the judgments were entered on May 1, 1947.

The Continental Casualty Company and Goerig and Philp moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philp appealed within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.

Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of the others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.

As to the judgments against the three Macris on their cross-complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philp was of adversary parties and could not be

construed as on behalf of the Macris. So also of the judgment for the United States on the second count against the Macris alone. The statute was not tolled as to it.

The joint and several judgment on the count in favor of the United States and against the Macris and their surety and that in favor of the Continental Casualty Company against the Macris on their agreement to hold it harmless present a different question. It is contended that since there might have been a granting of the motion for a new trial in favor of the Continental Casualty Company, the Macris' surety, which would dispose of the same issue as that decided against the judgment debtors Macris, co-jointly and with their surety, the pendency of the motions for a new trial by one of such debtors tolled the time for appeal as to all of them.

The Macris cite Brockett, et al., vs. Brockett, 2 Howard 238, 240, the leading case of the judge-made law that the pendency of a motion to modify a decree or for a new trial tolls the statutory time for appeal.* However, the opinion there states that the petition to have opened the decree, the consideration of which tolled the statute, was by the losing "defendants" (plural). The title of the case, with Brockett, et al., as appellants, as well shows the petition was not by one of them appealing alone.

More relevant is Zimmerman vs. United States;

*Now embodied in F.R.C.P. 73(a) effective March 19, 1948.

298 U.S. 167, where the judge sua sponte, extended the time to do all things connected with the decree because "it will be necessary to modify and amend the said decree." There the Supreme Court reasoned that since none of the defendants decreed against could know how the amendment would affect him, the statute was tolled as to all. Cf. *Leishman vs. Associated Electric Co.*, 318 U.S. 203, 205.

It is apparent that if the motion for the new trial were granted to the surety of the Macris, it would be on grounds that in justice would require a similar relief for the Macris against the judgment on the first count in favor of the United States and also that against them and in favor of the surety. If the trial court on the motion of the surety had the power to set aside these two judgments, the Macris could not know until the surety's motion were decided whether the judgments were final as to them. That is to say, they would be in the situation of the parties in the Zimmerman case.

The question, then, is could the trial court under Rule 59(a) of the Federal Rules of Civil Procedure have granted a new trial to the Macris on their judgment on the motion of their surety. As to judge-tried cases, Rule 59(a) provides:

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. * * * (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United

States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”

It is not a strained interpretation of the language of the first sentence of the rule that a motion of a surety to “open,” that is, set aside, a joint and several judgment against it and its three principals empowers the court to set it aside as to all four of them. We have held that those rules must be liberally construed. *Phillips vs. Baker* 121 Fed. (2d) 752, 754; *Pierkowskie vs. New York Life Ins. Co.*, 147 Fed. (2d) 928, 933 (C.C.A. 3); *Fakouri vs. Cadais*, 147 Fed. (2d) 667, 669.

An analogy to such an interpretation of power in the district court is the power of the appellate court on an appeal taken by but one party on an issue which, if resolved in his favor, will likewise affect another party, to reverse the judgment as to such non-appealing party. *In re Barnett*, 124 Fed. 1005, 1009 and state cases cited: *Maryland Casualty Co. vs. City of South Norfolk*, 54 Fed. (2d) 1032, 1039; c.f. *Washington Gas Light Co. vs. Lansden* 172 U.S. 534, 555.

Since it is our view that the motion for a new trial by their surety tolled the statute for the *Macris*, on their appeals from the judgment on the first count of the complaint of the United States and

the judgment in favor of Continental Casualty Company, we hold they conferred jurisdiction here. As to the other appeals of the Macris, we order entered a judgment of dismissal as to them.

[Endorsed]: Opinion upon motion to dismiss appeal of Macri, et al. Filed Mar. 31, 1948. Paul P. O'Brien, Clerk.

EXHIBIT R

United States Court of Appeals
for the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,

vs.

M. C. SCHAEFER, etc., et al.

Excerpt from Proceedings of Tuesday, October 19, 1948.

Before: Denman, Chief Judge, and Healy and Bone,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Elwood Hutcheson, counsel for appellant, Continental Casualty Company, and by Mr. Tom W. Holman, counsel for appellants, Macri, et al., and by Messrs. Stuart W. Hill and Harry L. Olson, counsel for appellee, Schaefer, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February
11, 1949.

Before: Denman, Chief Judge; Bone and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day
rendered by this court in above cause be forthwith
filed by the clerk, and that a judgment be filed and
recorded in the minutes of this court in accordance
with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Appeals from the District Court of the United States
for the Eastern District of Washington South-
ern Division

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

Denman, Chief Judge:

OPINION

The several Macris, hereafter so called, contrac-
tors on a government contract under the Miller Act,
appeal from a judgment in favor of Schaefer, their

sub-contractor, for labor and materials furnished in the performance of a subcontract and modification thereof.

Continental Casualty Company, hereafter called Continental, appeals from a judgment against it as surety on the contract between the Macris and the United States, described *infra*, in favor of Schaefer for the amount of the judgment against the Macris.

The Macris do not contend that they are not liable for an unpaid balance on the contract price included in the judgment, but contend they are not liable for more than the contract price. They contend that the evidence does not support the court's findings that they breached the subcontract and, on the contrary, that the extra work done by Schaefer was in the performance of that contract. Continental's appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract. Continental also seeks to recover here additional attorney's fees for prosecuting this appeal. The dispute between Schaefer and the Macris arises out of the performance of a subcontract to do the cement work on the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington. Schaefer sued to recover \$57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on a quantum meruit theory after the alleged breach of a contract by the Macris. The subcontract between Schaefer and the Macris provided that Schaefer was to furnish all

labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans as specified (in certain numbered specifications).

The trial court, sitting without a jury, found that the Macris were to perform all of the excavating and to furnish all of the materials necessary for the performance of the subcontract with the exception of form wire, nails and curing materials. The excavating and materials were to be furnished in accordance with specifications and in proper time for the performance of the subcontract by Schaefer. The court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found wilful and negligent and they continued and persisted throughout the entire performance of the subcontract.

The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to continue performance and to perform some of the work the Macris were to do, and that Schaefer

would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that "there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon (Schaefer by the Macris' breaches)."

The subcontract contained a provision that in order to obtain extra compensation, written notices and statements were required. The court found that the Macris had waived this provision by their conduct toward Schaefer by accepting and acting upon the oral notices given.

Judgment was rendered in favor of Schaefer against the Macris and Continental for \$56,764.97, with interest from date of judgment. Also, a judgment in that same amount was rendered in favor of Continental against the Macris, plus \$1750 for Continental's attorneys' fees. Continental and the Macris both appeal from the judgments, and Continental asks for additional attorneys' fees from the Macris to cover the prosecution of this appeal.

A. The law governing the several issues.

On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel that the reasons underlying the doctrine of *Erie Ry. Co. v. Tomkins*, 304 U. S. 64, are applicable here, where the issue does not involve construction

or application of a federal statute. *Blair v. United States*, 147 F. 2d 840, 849 (Cir. 8). Cf. *Goerig v. Continental Casualty Co.*, 167 F. 2d 930 (Cir. 9). The rights and liabilities of the parties under the subcontract should not depend on the choice of forum sought to enforce these rights. Cf. *Guaranty Trust Co. v. York*, 326 U. S. 99, 109. Hence we should decide this issue as would a state court sitting in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable. *Hatcher v. Idaho Gold and Ruby Mining Co.*, 106 Wash. 108, 113, 179 P. 106.

On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal statute, the Miller Act, under which it was created *Liebman v. United States*, 153 F. 2d 350 (Cir. 9).

B. Macris' Liability to Schaefer.

The district court held that there was an "implied agreement or quasi-contract" to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will

not weigh the evidence in such a case. F.R.C.P. Rule 52 (a). We cannot say that this finding is clearly erroneous.

Since the court found that the subcontract was wilfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements which were intended to induce reliance. *Olwell v. Nye and Nisson Co.*, 26 Wash. 2d 282. Whether the theory is called implied-in-fact contract, quasi-contract or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit. *Nelson v. City of Seattle*, 180 Wash. 1, 28, 38 P. 2d 1034. Cf. *United States v. Zara Contracting Co.*, 146 F. 2d 606 (Cir. 2); 5 Williston, *Contracts* (Rev. Ed.) §1480.

The Macris contend that Schaefer may not recover for the extra work because he has not complied with the contract provisions regarding written notice of changes in order to get extra compensation. The trial court found that the Macris had waived these provisions by accepting and acting on the oral notices, and there is ample evidence to support such a finding. Such a provision does not deprive the parties of the power to modify the contract without a writing, *Richie v. State*, 39 Wash. 95, 81 P. 79.

The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d

468 (Cir. 9). That case is not applicable here because it was a diversity case in which this court expressly applied California law to determine the rights of the parties under the contract. Furthermore, that case is distinguishable in that the nature of the claim, although on the theory of quantum meruit, was really for damages for delay, and the plaintiff there had failed to comply with provisions of the City's charter relating to filing such claims within sixty days. Also, there the alleged extra work done was that which the plaintiff contracted to do, but it had become more burdensome due to unanticipated conditions. The City had held out no added inducement to the contractor to continue performance, and did not, by implication or otherwise, agree to pay the contractor anything beyond the amount fixed in the written agreement. In the instant case, no statute limits the Macris' liability for breaches of the subcontract, and also Schaefer has performed work at the Macris' request which was not called for by the subcontract. We hold the Macris liable for the extra work performed at their request.

C. Method of Ascertaining the Amount of Recovery.

Macris contend that Schaefer should not recover because he has failed to prove the increased cost of the work because of Macris' defaults. Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account

and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed.

D. Continental's Liability to Schaefer.

Section 1 of the Miller Act, 40 U.S.C. §270 (a), provides that the contractor with the government shall furnish "a payment bond * * * for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of each such person." Section 2, 40 U.S.C. §270 (b), provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit * * *."

Continental contends that Schaefer's cause of action is for damages for breach of the subcontract by the Macris, and that a surety under the Miller Act is not liable for such damages. *United States v. Maryland Casualty Co.*, 147 F. 2d 423 (Cir. 5);

L. P. Friestedt Co. v. United States Fire Proofing Co., 125 F. 2d 1010 (Cir. 10). These cases are distinguishable from the instant case in that there was no agreement there by the general contractor or the United States to pay any additional amount for the extra work done. Here the court below found, "That pursuant to said subcontract * * * and pursuant to the oral conversations, representations and inducements herein referred to, (Schaefer) between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the (Macris) at their special instance and request of the reasonable cost and value of \$89,498.71." From this amount was deducted the amount the Macris paid on account, which left a balance of \$56,764.97, the amount of the judgment. It does not appear from this finding that the amount of the judgment included damages for breach of contract.

In the Friestedt case, *supra*, at page 1012, the court said, "There is here no claim that they (the subcontractors) furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract * * * What was done was not required by any of the terms of the contract but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract; * * *" Here the new agreement between the Macris and Schaefer contemplated that Schaefer was to perform extra work, which the Macris were originally obligated to perform, in order that the

main contract between the Macris and the United States could be performed. The performance of the new agreement furnished labor and materials agreed by the Macris to be supplied under the main contract and hence labor and materials within the terms of the Miller Act and the bond. Cf. *John A. Johnson & Sons v. United States*, 153 F. 2d 534 (Cir. 4). The judgment against Continental is affirmed.

E. Attorneys' fees for Continental's Appeal.

The trial court awarded Continental \$1750 for attorneys' fees in that court. Continental now seeks to recover in this court fees for the prosecution of this appeal, pursuant to a provision in the application for the bond which required the Macris "to indemnify the company (Continental) against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all kinds of liability therefor, sustained or incurred by the company * * * in prosecuting or defending any action brought in connection (with the bond.)" There is also a provision "that separate suits may be brought hereunder as causes of action accrue" without prejudice to other suits regardless of when the cause of action arises.

No cause of action had accrued for the attorneys' services in this court when the case was pending in the district court. Whatever right the parties may have for this more recent cause of action should be instituted in a court of first instance. It is an original proceeding which cannot be initiated here.

In the three cases cited by Continental: *American*

Can Co. v. Lodoga Canning Co., 44 F. 2d 766 (Cir. 7); Davis v. Parrington, 281 Fed. 10 (Cir. 9) and Rigopoulous v. Kervan, 140 F. 2d 506 (Cir. 2), the statutes involved created in the appellate court the right there to recover attorneys' fees.

The judgment of Schaefer against the Macris and Continental is affirmed. The petition for allowance of attorneys' fees is dismissed, without prejudice.

[Endorsed]: Opinion. Filed Feb. 11, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY

vs.

M. C. SCHAEFER, etc.

A. J. GOERIG and CLYDE PHILP

vs.

CONTINENTAL CASUALTY COMPANY.

SAM MACRI, et al.,

vs.

M. C. SCHAEFER, etc.

JUDGMENT

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Southern Division, and on petition of Continental Casualty Company for allowance of attorneys' fees on the appeal and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be, and hereby is affirmed, and that the petition of Continental Casualty Company for allowance of attorneys' fees on the appeal be, and hereby is denied.

[Endorsed]: Filed and entered Feb. 11, 1949.
Paul P. O'Brien, Clerk.

EXHIBIT S

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 5, 1949.

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, Continental Casualty Co., filed March 7, 1949, and the petition of appellants, Macri, et al., filed March 10, 1949, both within time allowed therefor by rule of court, for a rehearing of above cause be, and each of them hereby is denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF
APPEALS FOR THE NINTH CIRCUIT,
TO RECORD CERTIFIED UNDER RULE
38 OF THE REVISED RULES OF THE
SUPREME COURT OF THE UNITED
STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six volumes, containing two thousand two hundred and seventy-five (2,275) pages, numbered from and including 1 to and including 2,275, to be a full, true and correct copy of the entire record together with original documentary exhibits transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, Continental Casualty Co., and the appellants, Macri, et al., and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of April, 1949.

[Seal]

PAUL P. O'BRIEN,
Clerk.

EXHIBIT T

United States Circuit Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY,
Appellant,

vs.

M. C. SCHAEFER, etc.,
Appellee.

ORDER STAYING ISSUANCE
OF MANDATE

Upon application of Elwood Hutcheson, Esq., counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed, pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May 16, 1949. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN,
United States Circuit Judge.

Dated San Francisco, Calif., April 5, 1949.

[Endorsed]: Filed April 5, 1949. Paul P.
O'Brien, Clerk.

EXHIBIT U

August 8, 1950.

Brethorst, Holman, Fowler & Dewar,
Attorneys at Law,
17th Floor, Hoge Building,
Seattle 4, Washington.

Attention: A. T. Bateman.

Re: Schaefer v. Macri, et al.

Gentlemen:

I have your letter of August third enclosing original and copy of proposed order in connection with the Macris' cost bond and I am unable to approve the same for two reasons:

First: I at one time examined the bonds filed in connection with the appeal and I recall that at least one of the bonds was conditioned upon payment of any damages caused by any delay resulting from the appeal. Mr. Schaefer asserts that these damages are substantial and contemplated instituting suit for the same.

In the second place, when the Continental Casualty Company paid the judgment in connection with this case they took an assignment of the judgment to them and when I called Mr. Hutcheson, who represents the Bonding Company, he was also opposed to my approving the order.

Yours truly,

HARRY L. OLSON.

HLO:re

EXHIBIT V

Conversation with Mr. McKelvy August 16, 1950
From 1:30 to Approx. 2:35 P.M.

After saying hello to one another, he asked: "How is business?" I said: "Nothing to brag about." He said: "I thought it would be good." I said: "No, you see, we are still in the concrete sub-contracting game instead of doing general contract work because of the lack of money due to the heavy expense of the suit, and aside of that, we are not able to make bond on any work." Mr. McKelvy said: "This statement came up and I told the girl at the office that I would take it along and see what I could do with it." I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run-around. He then said: "Well, I don't see where that affects this account. Now if it is too much, why you set the amount and let's get it cleaned up. In any event we will not sue you as the statute of limitations has run on it." I then said: "As far as an account being outlawed by time doesn't make any difference to me. If an account is just, I will pay it anyway, regardless of the time." He said: "Well, I would, too, and on this I think we earned it. Apparently you don't think so." I said: "Well, I want to see what the score really is. I've gotten the run-around for a long time and I would like to find out why I was led right up to the brink where I only had

about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—‘We can’t represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.’ I then asked you how much time I yet had before the deadline, and you said—‘About a month.’ ” Mr. McKelvy then said: “We did not know before that time that Continental Casualty Company would be involved in a suit or we would not have taken your account. If it were the money we were after and thought Continental Casualty Company would become involved, we would not have taken your case in the first place. As it was, they asked us to represent them, but we turned them down.” I then said: “Now, that would have been nice if you would have agreed to represent them after having represented me, wouldn’t it?” McKelvy then said: “I don’t like your implying that we are crooked. We have been in business and had a good reputation since before the turn of the century.” I said: “I didn’t make that statement. I am just relating what has happened that I don’t like. Now, wouldn’t it have been much better if you had informed me the first time that I was in your office that you couldn’t represent me as Continental Casualty Company was one of your largest accounts instead of leading me right up to the brink where, if I had not been on my toes, I would have lost my right to sue.” McKelvy said: “Yes, but our hindsight is now much better than our foresight and we did not believe

that Continental Casualty Company would be involved." I said: "Nevertheless, they were Macri's Bonding Company and you knew it." And then I also said: "Then you remember the time you told me as you and I were walking up the street that I couldn't collect from Macri as he had all his assets hidden, that the chances of holding Continental were very slim, and told me to turn my business and anything of value over to brother Bill, a brother-in-law or someone I could trust and thereby get rid of the account with Uncle Sam and all other old accounts. And how you handled an account for a local contractor and the Bank in that case lost approximately \$83,000.00 and you got their release on it and that the contractor is still doing business. I told you then that my road was a straight road, probably long and rough as hell, and that's the only road I'm traveling and if it busts me up that is still the way it's going to be done. You remember that, do you?" Mr. McKelvy said: "Yes, I do." I said: "And how when you showed me young Macri's picture and told me that—'This is just a coverup of Macris' assets. Everyone knows the kid didn't do it, but he has had his day in court and that's a closed book.' You remember that, don't you?" Mr. McKelvy said: "Yes, I do." I said: "Then after they had Macris' assets hidden, they came up with a termination agreement to protect Philp & Goerig, and that damn thing is predated ahead of our pouring concrete or dated the middle of July. Now isn't that something?" McKelvy said: "I think you may have that about

right.” I said: “I just want to find out if a bonding company can do this on two different jobs. First, on a job where the General Contractor goes broke before the job is completed, the bonding company takes over, submits statements to the school board, as an example, receives payment on same, receives statements from subcontractors and material companies and pays them. In this way they are filling the shoes of the General Contractor where the public is concerned or the public officials are concerned or they would soon be out of business. But take the second job where the general contractor completes the job there is no general public concerned and they just tell the subcontractors and material men to go to hell or in effect just as much. Then we have to spend \$40,000.00 to \$50,000.00 to collect \$57,000.00 plus interest from date of judgment. I am getting suit ready now.” McKelvy said: “That will take another 10 to 15 years.” I said: “I don’t care. I’ll still have six years left. I owe it to my conscience, my men, and to other sub-contractors to clear such a situation up.” Then I said: “And what about the meeting that I had with you at your office at about 11:30 a.m. and we only greeted one another and had a few words but did not get into our subject, when you told me that you had a luncheon speaking engagement and would meet me back at your office at 1:15 p.m. This was the arrangement when we walked out of your office. I was back to your office a little before one. The outer office girl asked if I were waiting for you. I said ‘Yes.’ and she said, ‘Mr.

McKelvy isn't going to be in any more today.' I said, 'Yes, he is to be back at 1:15—that was our arrangement just before lunch.' 'I will wait.' Then approximately at 1:20 she said: 'I really don't think he will be back as he is going out to his new home.' I asked what the telephone number was; and she said, 'I don't know, he has no telephone out there yet.' I asked what the address was; and she said, 'I don't know.' I asked if there wasn't someone in the office that did; and she said, 'I am sure there isn't.' I waited until about 3:30 then came home. It was about that time that I was really putting on the pressure to get the suit started." Mr. McKelvy said: "I don't remember that I ever had such an appointment with you and let you sit. I don't deny it, but we just don't do business like that." I said: "At that first meeting in your office after I told you of my gripe, you had Mr. Skeel in and told him the story. Mr. Skeel said, 'Well, you can't hold the Casualty Company—and only Macri, if you have absolute segregated costs as this is in the contract and that is not.' " Now, I said: "That's impossible in a situation like this. Now why didn't you or Mr. Skeel inform me at that time that Continental Casualty was an account of yours?" Mr. McKelvy said: "Well, we didn't think they would be involved." I said: "No, you thought that we would sue as many others did in the past and let it be called damages and we would lose our case." Mr. McKelvy said: "Well, I advised you to get Olson and he did you a good job, didn't he?" I said: "Yes, you gave us the name of about four attorneys

and we selected Olson and that was on my question of a good attorney in Yakima.” McKelvy said: “I spent some time on the phone with Mr. Olson. I called Mr. Olson twice and I also have some copies of letters in my files that I wrote to Olson telling him to watch out so that it would not be called damages.” I said: “You did!—You ask Olson who told him at the first and second meetings not to use the word damage, that we were suing for cost, and I told him at the third meeting after he used the word that if he were going to use it again it meant only one thing to me, that I would have to get another attorney. That he shouldn’t even think the word in connection with this suit. A suit in damages may come later, this has to be in Quantum Meruit.” Mr. McKelvy said: “Well, I would like to get this account off the books, so I’ll leave it up to you. You pay me what you want to and we’ll call the account paid. I just want something so we can close our books.” I said: “I’m not doing anything about it.” Mr. McKelvy said: “Well, if that’s it, we’ll just have to write it off and forget about it then.” (He then left our office.)

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

DEMAND OF PLAINTIFF FOR JURY TRIAL

Comes now the plaintiff, and demands a trial by jury of all the issues involved in this cause, said issues being more particularly disclosed by the Seconded Amended Complaint on file herein.

Dated this 15th day of June, 1951.

/s/ M. C. SCHAEFER,
Plaintiff.

State of,
County of.....—ss.

Service of the within Demand of Plaintiff for Jury Trial is hereby accepted this day of, 1951.

.....

[Endorsed]: Filed June 15, 1951.

—

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. The second amended complaint fails to state a claim against this defendant upon which relief can be granted.

2. The cause, if any, is barred by the statute of limitations. That more than two years has expired since the commencement of any cause of action based upon conspiracy and more than three years has expired since the commencement of any cause of action against this defendant.

3. There is a misjoinder of parties defendant.

4. There is a misjoinder of causes of action.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, Continental Casualty Company, a corporation, moves the court to dismiss the action against Continental Casualty Company, a corporation for the following reasons:

1. The Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

2. The action is barred by the statute of limitations.

/s/ CARL E. CROSON,
/s/ WILLARD HATCH.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle, Washington, on the day of, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,
/s/ WILLARD HATCH.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 25, 1951.

M. C. SCHAEFER STATEMENT
RE JUDGE ASSIGNMENT

Your Honor I will be happy if you will assign this case to a judge who has a philosophy of life that is coupled with a desire to help make this world a little better place to live for those who come after him and who has not at any time worked for, or done post graduate work in the office of, or has had mutual business relations with any of the defendants, their attorneys or others having an interest in this case.

I am also very interested that this judge then have ample opportunity to peruse the complete file in this case, before this motion again comes on for hearing.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed July 2, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants, Sam Macri, Don Macri and Joe Macri, individuals, move the court to dismiss the action against them for the following reasons:

1. The Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

2. The action is barred by the statute of limitations.

/s/ GRANVILLE EGAN.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle, Washington, on the day of, 1951,

at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ GRANVILLE EGAN.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 5, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Number 2673

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI, and JOE MACRI,
Individuals; and W. R. McKELVY; and CON-
TINENTAL CASUALTY COMPANY, a Cor-
poration,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

July 2, 1951—2:00 P.M.

Appearances:

M. C. SCHAEFER, The Plaintiff,
Appeared on behalf of Plaintiff.

GRANVILLE EGAN, ESQ.,

Appeared on behalf of Sam Macri, Don
Macri and Joe Macri, Defendants.

WILLARD HATCH ESQ., of

KUMM, HATCH and COOK,

Appeared on behalf of W. R. McKelvy and
Continental Casualty Company, Defendants.

Whereupon, the following proceedings were had,
to wit: [2*]

The Clerk: Do you have a matter?

Mr. Egan: A motion. It is a motion made by
Mr. Hatch's group and which I wish to join in
orally, if I may.

Mr. Hatch: The motion is one that we have used
before. You have probably had a brief look at the
file but it is so voluminous that I better start at the
beginning.

The Court: I might say it came in after my
lunch hour.

Mr. Hatch: I wouldn't expect you to get much
out of it in an hour. It is a civil conspiracy action
against the three Macris, W. R. McKelvy, an attorney
in Seattle, and Continental Casualty Company,
and Clyde Philp and A. J. Goerig who have not
appeared.

It is brought by Mr. Schaefer pro se and he has
no attorney representing him and hasn't had in
these proceedings.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

At the time of the first Complaint we brought forth a motion to dismiss the action and at that time Judge Bowen expressed a desire not to handle the case and transferred it to Judge Lemon of Sacramento and he heard the motion to dismiss, which was granted.

An amended complaint was filed and motions to dismiss were served and filed and, not having a judge, we noted the motions before Judge Bowen asking that the motions be assigned to some judge.

They were assigned to Judge Sam Driver and he heard them and dismissed it and a second amended complaint was filed and now we do not have a judge and we are now hoping that it will be [3] assigned to your Honor. Up to now we have been floating around with visiting judges.

We are not ready to argue today. The case has been referred to your Honor, subject to your approval, and if you refuse the case I assume it will have to go to Judge Bowen for assignment. It is a jury action and I can not see why your Honor would be unwilling to take the case and I would be delighted to have you do it.

If you do, it will be necessary to have you hear the motions to dismiss on behalf of McKelvy and Continental Casualty Company. They are on file, or will be, this afternoon.

That is the only matter for consideration: If you will take the case. And, if so, when can you hear our motions to dismiss.

The Court: Mr. Hatch, you represent whom?

Mr. Hatch: Continental Casualty.

The Court: And you?

Mr. Egan: The three Macris.

Mr. Hatch: And at this time I appear for W. R. McKelvy.

On the top of the file you will find the requirements regarding the Judge who considers the case and I suppose he will ask you to consider that.

The Court: Did you say there was some sheet——

Mr. Hatch: I believe on top of the file there should have been a typewritten sheet. A yellow sheet.

The Court (Looking at file): This motion to dismiss [4] would be the second amended——

Mr. Hatch: Motions to dismiss the second amended Complaint are on file, but our sole purpose in being here today is to determine when, and if, we can hear it.

The Court: But this is the Second Amended Complaint?

Mr. Hatch: Yes, the Second Amended Complaint.

The Court: Was this action dismissed? This action was never tried on its merits?

Mr. Hatch: No. There has been a dismissal on each of the first two complaints.

The Court: Upon motions to dismiss?

Mr. Hatch: Upon motions to dismiss.

The Court: Is Mr. Schaefer here?

Mr. Schaefer: Yes, your Honor.

The Court: You are the Plaintiff?

Mr. Schaefer: Yes.

The Court: Do you wish to make any comment?

Mr. Schaefer: No, I don't think there is any comment necessary on my part. The situation as of now is as represented by Counsel for the Defendant.

The Court: You are appearing as your own counsel?

Mr. Schaefer: Yes. I was unable to secure counsel in the State of Washington.

The Court: Are you an attorney yourself?

Mr. Schaefer: No, I am not. [5]

The Court: Gentlemen, I am a little reluctant to set a time, or to take any further action at all, without having a chance to read this matter over and become a little more familiar with it. It may involve some judgment, from the size of it, and from what you say, that, in order for the Court to come to an intelligent conclusion, I probably should have an opportunity to read the file.

I am wondering if I might reserve opinion on the disposition to be made—whether I should accept it and fix a time—until, say, next Monday. I don't mean to set next Monday for hearing arguments, but fix next Monday as a date to make further disposition, either as to whether this Court proceeds with the case or as to whether some other disposition should be made.

Is that acceptable to you?

Mr. Egan: That is agreeable to the Macris.

Mr. Hatch: I hope your Honor will. We feel like orphans.

The Court: It isn't that. It is a matter that has

had attention before and any conclusion I reach now would be without background.

Mr. Hatch: As a favor to Mr. Schaefer could your Honor read the file and set a date and give it to us by letter and then Mr. Schaefer would not have to make a trip.

Mr. Schaefer: It would be all right with me, the inconvenience.

The Court: Your suggestion is that the Court, after [6] he has an opportunity to examine it, advise you by letter, all parties——

Mr. Hatch: All parties.

The Court (Continuing): ——as to, first, the Court's taking the case, and, if so, as to a date for argument on the motions?

Mr. Egan: May I interrupt?

The Court: Yes.

Mr. Egan: Yes. At that time you will require the presence of all of us. Because this being the time of vacations, it will be a little difficult to fix a time unless your Honor might indicate a time and, if you agreed to accept the case, why, you could probably settle the time right now conditioned upon your accepting the case.

We were discussing that our vacations conflict and Mr. Schaefer may require additional time and, if we could agree upon a date now, conditioned upon your Honor's reviewing the file and accepting the case, that would settle the whole thing without our further appearing before you.

The Court: You would be heard, first, on the motions to dismiss.

Mr. Egan: Yes, sir.

The Court: How long will that take?

Mr. Hatch: We have consumed, usually, a morning or an afternoon with it.

The Court: Half a day?

Mr. Schaefer: I believe it will take me a good half day, if not more time than that, to get what I have to say orally in the [7] matter.

Mr. Hatch: We have never used over half a day yet.

The Court: Well, in the event Mr. Schaefer will take that time, and the matter was set for 10:00 o'clock, it might go into the afternoon. What suggestions have you for a time?

Mr. Hatch: Well, I think we will probably have to postpone it until the second or third week in August, according to the vacation schedules, because Mrs. Curry, who represents Mr. McKelvy, will be out, and then Mr. Egan will be out, and I will be out until the 5th or 6th of August.

The Court: August is a very bad month. What comment have you, Mr. Schaefer, as to time?

Mr. Schaefer: The only idea I have about it is that I wish the Court would take time enough to go into the whole of the file and analyze all the file so that a decision might be rendered at the time that the case is heard on the motion to dismiss for certain reasons that I may want to express myself on the hearing to dismiss.

The Court: But as to a day in August or July?

Mr. Schaefer: Well, any time would be all right

that meets with your desire on that, your Honor. Any time after three weeks, I would say.

The Court: Any time after?

Mr. Schaefer: Yes, later than that.

The Court: In other words, July is not acceptable for you either. [8]

Mr. Schaefer: No. I thought it would probably take three weeks for your Honor to have time enough to peruse the whole of the Complaint.

Mr. Hatch: Might I suggest August 16th, your Honor?

The Court: I won't be here. The only days in August that the Court will be here are the 1st, 2nd and 3rd, and then the last week of August, possibly; possibly the 30th and 31st.

Mr. Egan: Did I understand you to say the 1st, 2nd and 3rd will be open?

The Clerk: We have four jury cases set for July 31st. Some will go over.

The Court: I am inclined to believe it will have to go over until September.

Mr. Hatch: Maybe we better appear on Monday. I can remember mine through August but if we get into September I have to look for my trial calendar before we agree on a date. I know we have a lot of cases set in September.

The Court: The Court is also hearing matters in the Eastern District and at that time the Calendar and matters assigned would be heard. That is what I would suggest—that the matter go over until Monday. By that time I will have had a chance to read the file, not for completeness but to have some idea what the issue is.

Now, I do not like to have Mr. Schaefer come up here——

Mr. Schaefer: That is quite all right. I will be here.

The Court (Continuing) ——unnecessarily, and, if [9] you should see fit not to appear, or accept the decision at that time without appearance, I can see no reason why you have to come because what will be done on Monday is to determine, first, if the Court will accept the case and then set a date for hearing motions.

Mr. Schaefer: That will be 10:00 o'clock on Monday?

The Court: 10:00 o'clock, Monday.

Mr. Hatch: Thank you, your Honor.

Mr. Schaefer: Thank you.

(Whereupon, other ex parte matters were considered and at 2:40 o'clock p.m., July 2, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court hereby certify that the foregoing is a full and complete transcript of matters herein set forth.

..... [10]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

July 9, 1951—10:00 A.M.

Appearances:

M. C. SCHAEFER, The Plaintiff,
Appeared on behalf of Plaintiff; and

GRANVILLE EGAN, ESQ.,
Appeared on behalf of Sam Macri, Don
Macri and Joe Macri, Defendants; and

MRS. ALTHA P. CURRY, of
SKEEL, McKELVY, HENKE, EVENSON
and UHLMANN,
Appeared on behalf of W. R. McKelvy,
Defendant.

Whereupon, the following proceedings were had,
to wit: [2*]

The Clerk: Number 2673, M. C. Schaefer,
Plaintiff, vs. Sam Macri, Don Macri and Joe Macri,
W. R. McKelvy, and Continental Casualty Com-
pany, Defendants.

The matter is on for fixing a time for hearing
Defendant's motion to dismiss second amended com-
plaint of Plaintiff. Mrs. Curry for Defendant, Mr.
Egan for Defendant, and Mr. Schaefer for himself.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

Mrs. Curry: I am here representing McKelvy, Defendant. Mr. Hatch will not be here.

The Court: At the time the matter came before the Court a week or so ago the matter was placed on the Court's desk just before convening and I didn't have an opportunity to go over it. I haven't attempted to examine the pleadings and all the file in detail, although I have gone over them and am aware, generally, of what has happened.

Now the Court is disposed to accept the transfer of this matter, at least for the purpose of hearing motions to dismiss, and I had in mind setting down the matter for argument on Monday, August 6th, if that is satisfactory.

Mr. Egan: That will be satisfactory to Defendants Macri.

Mrs. Curry: I have no objection. I do not want it for two weeks beginning the 16th of July.

The Court: I understood you would be away that period.

Mrs. Curry: Yes. [3]

The Court: It was set down earlier but it was thought it might conflict with your——

Mrs. Curry: No. Well, the 30th would make it rather crowded. I would prefer the 6th.

The Court: Mr. Schaefer?

Mr. Schaefer: That is all right, your Honor.

The Court: Now I will say this: That this matter is up now upon motion to dismiss on the Second Amended Complaint, that being the third Complaint filed.

Mrs. Curry: That is right.

Mr. Schaefer: That is right.

The Court: At the time——

The Clerk: We were to set it for 11:00 o'clock that morning because there were other matters scheduled from 10:00 to 11:00 on August 6th.

The Court: At the time there will be three appearances for the Defendants?

Mrs. Curry: Yes, your Honor.

The Court: I am wondering about the time. Do you have in mind dividing some of that time, or——

Mrs. Curry: I am amenable to any suggestion of the Court on that.

The Court: The Court had in mind this: Mr. Schaefer indicated he wanted considerable time. I appreciate, Mr. Schaefer, your position but, of course, the Court's time is limited. I had in [4] mind giving one and a half ($1\frac{1}{2}$) hours to each side as a maximum. Now, I would suggest this to Mr. Schaefer: On this argument—I would say, first of all, that I gave that much time in view of the request made by Mr. Schaefer—now——

Mr. Egan: That will take us all day. I would suggest that forty-five (45) minutes be given to Mr. Schaefer and that we divide forty-five (45) minutes. That will be sufficient time.

Mr. Schaefer: I don't think it will be. I think I will require more time than that.

The Court: The Court realizes that this matter has been before various judges and, unfortunately, was delayed. On the other hand, the Plaintiff, not having counsel, is in somewhat different position than if he was represented by counsel.

Without fixing time, the Court will allow the maximum time of one and a half ($1\frac{1}{2}$) hours per side.

I will say this, Mr. Schaefer, that in making this argument I would suggest that you address your argument to the points raised in the last ruling of the Court, namely, to meet those specific issues and to indicate wherein your Second Amended Complaint meets the defect of the former complaint, because, reading briefly, the comments made by former ruling, the objections, among other things, has been to the lack of specific allegations of conspiracy, and so on.

There is no purpose in the Court's listening to argument on the issues, so I suggest that you address your argument to showing—to the issue of showing—wherein this Complaint meets the defect of the [5] former Complaint.

Do you understand?

Mr. Schaefer: I understand what you mean.

The Court: Is there any further comment?

Mrs. Curry: No. Eleven o'clock, August 6th.

The Court: Eleven o'clock, August 6th. At that time the Court is hopeful that less time than indicated will be taken, but I had in mind Mr. Schaefer's request for half a day.

Mrs. Curry: Thank you.

Mr. Schaefer: Thank you.

(Whereupon, at 10:30 o'clock a.m., July 9, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court hereby certify that the foregoing is a full and complete transcript of matters herein set forth.

.....

[Endorsed]: Filed July 12, 1951. [6]

[Title of District Court and Cause.]

MOTION FOR ORDER PERMITTING FILING
OF SUPPLEMENTAL COMPLAINT

Comes now plaintiff and respectfully moves the Court for an order permitting the filing of a supplemental complaint on the grounds and for the reasons that the public records of the Superior Court in the State of Washington for King County show that shortly prior to the time plaintiff retained the services of defendant, McKelvy, to handle the requested litigation more fully described in plaintiff's amended complaint against the Defendants Macri and Continental Casualty Company, that said Defendant McKelvy was then representing said Defendants Macri; that Case No. 356892 was filed on October 10, 1944, by the said three Defendants Macri, d.b.a. Macri Brothers, against James E. McHugh, et al., that the defendant, W. R. McKelvy, was attorney of record for said Macris from the date of filing thereof, on October 10, 1944, through the conclusion of said case, which was dis-

missed by stipulation and order of dismissal on April 4, 1945, and that said public records further show that in Case No. 362898 Superior Court, King County, Washington, filed January 1, 1945, wherein Adeline E. Towey was plaintiff and Continental Casualty Company was defendant, the said W. R. McKelvy was attorney of record for said Continental Casualty Company, thus making it clear beyond any shadow of doubt that Defendant McKelvy represented the Defendant Continental Casualty Company, and represented the Defendants Macri in other litigation at the very time Defendant McKelvy purportedly was acting for and in behalf of plaintiff herein.

Plaintiff further moves the Court for an order to further amend by naming as an additional party defendant, one B. J. Rask, and allege, in substance, with respect thereto that on or about March 8, 1951, said Rask, who prior to that time was a total stranger to plaintiff, called upon plaintiff representing that he, Rask, was in the insurance and bonding business and sought plaintiff's business in that line, but very soon after the meeting began, said Rask divulged that he was intimately versed in the details of the matters involved in this lawsuit, and threatened the life and welfare of the plaintiff and intimated plaintiff and his family if plaintiff persisted in this lawsuit, and plaintiff alleges that said Rask was and now is a member of said conspiracy and that the aforesaid acts by him were done for and at the direction of one or more of the originally named conspirators.

It appearing that said Rask is a necessary and proper party to this suit and that appropriate allegations as to his participation are necessary for a proper allegation of my case, I respectfully move the Court for permission to file a supplemental complaint.

Plaintiff further moves the Court for permission to supplement subparagraph I of Paragraph VI on page 12, by adding to the end of the first sentence the following clause: "And that said Continental Casualty Company representative agreed to such deletion only after first securing the approval of W. R. McKelvy in Seattle by long distance telephone call." And to correct the date in the first line of said subparagraph I by changing it from November 9th to November 4th; the draft was delivered on the 4th and paid on the 9th.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT, McKELVY'S MOTION TO DISMISS THIRD AMENDED COMPLAINT

A complaint must allege facts showing violation of right.

Patten v. Dennis,

134 F. (2d) 139 (9 Cir.);

Kamm v. Flank,

(N.J.) 195 A. 629; 9 A.L.R. 1.

“Accurately speaking there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. * * * To sustain a civil action for conspiracy, special damages must be proved.”

11 Am. Jur. “Conspiracy,” Sec. 45.

The complaint must allege facts constituting civil conspiracy. The mere conclusions of “conspiracy” are insufficient.

Ransom v. Dollar S.S. Line,

2 F.S. 409;

Puget S. P. & L. Co. v. Asia,

2 F. (2d) 491;

Black & Yates v. Mahogany Assoc.,

129 F. (2d) 227. Cert. denied, 317 U. S.
672.

No cause of action in conspiracy exists because:

(a) No agreement or concert of the parties to accomplish an unlawful purpose or a lawful purpose unlawfully.

15 C.J.S. "Conspiracy," Section 1.

Kietz v. Gold Point Mines, Inc.,

5 Wn. (2d) 224.

(b) Combination must be a meeting of the minds.

Calcutt v. Gerig,

271 Fed. 22 (6 Cir.)—citing:

Alaska S.S. Co. v. International Longshoremen's Assn. of P.S., 236 F. 964 (Neterer, J.);

Ransom v. Matson Navigation Co.,

1 F.S. 224;

Asby v. Peters,

(Neb.) 258 N.W. 639, 99 A.L.R. 843;

Winsor Theater Co. v. Wallbrook Amusement Co., 94 F.S. 389.

There must be an unlawful act alleged which constitutes a fraud on the plaintiff.

Ransom v. Dollar S.S. Line,

2 F.S. 409;

Puget Sound P. & L. Co. v. Asia,
2 F. (2d) 491;

Eyak River Packing Co. v. Huguenot,
143 Wash. 227.

Circumstances can't be relied upon which are as consistent with the lawful as an unlawful purpose. In such case there is no conspiracy.

Dunlap v. Seattle National Bank,
93 Wash. 569;
Dart v. McDonald,
107 Wash. 537.

It is necessary to allege damage. There is no damage alleged as a consequence of any act of the defendants.

Moffett v. Commercial Tr. Co.,
87 F.S. 438;
Ransom v. Dollar S.S. Line,
2 F.S. 409;
State v. McIhenney,
(La.) 9 So. (2d) 467, 142 A.L.R. 533.

An act lawful by an individual is not unlawful by combination unless an unusual circumstance results to the injury of a third party and then the action of the group may have the excuse or justification of self-interest or competition.

Delorme v. International Bar Tenders Union
Assn., 139 P. (2d) 619;

Nustadt v. Employers Liability Assur. Corp.,
(Mass.) 21 N.E. (2d) 538, 123 A.L.R. 134.

11 Am. Jur. "Conspiracy," Section 46.

The bringing of an action or defense of an action is neither fraudulent nor unlawful.

Puget Sound P. & L. Co. v. Asia.

2 F. (2d) 491;

Abbott v. Thorne,

34 Wash. 691;

Manhattan Quality Clothes v. Cable,

154 Wash. 654.

The graveman of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff.

Park In Theaters v. Paramount-Richards

Theaters, 90 F.S. 927;

Nalley v. Oyster,

230 U.S. 165.

Respectfully submitted.

/s/ W. PAUL UHLMANN,

Attorney for Defendant,

W. R. McKelvy.

The cause of action if in conspiracy is barred by Section 165 Remington's Revised Statutes.

Mitchell v. Greenough,

100 F. (2d) 184.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RE-
SISTING MOTION OF DEFENDANTS
TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT

Conspiracies need not be established by direct evidence of the acts charged. They may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deducted from certain acts of the persons accused which are committed in pursuance of an apparently criminal or unlawful purpose in common to them. The existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury from other facts proved. It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means. If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purpose by their acts—often by the same means, each performing some part thereof—the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty. His participation in the conspiracy may be established without

showing his name or giving his description. 11 Am. Jur., Conspiracy, Section 38.

When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each. 11 Am. Jur., Conspiracy, Section 40.

The prosecutor may either prove the conspiracy, which renders the acts and declarations of the conspirators admissible in evidence, or he may prove the acts of the different persons and thus prove the conspiracy. However, there must be some tangible, material evidence of the conspiracy or a promise of its production before the Court can properly admit evidence of statements made in the absence and without the knowledge of the party against whom they are offered. The evidence need not be direct, positive, and conclusive; but there should be some evidence, and it is for the Court, in the first instance, to say whether or not it exists. 11 Am. Jur., Conspiracy, Section 42.

The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. 11 Am. Jur., Conspiracy, Section 45.

The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, regardless of whether they were original parties to the conspiracy

and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby. However, where the unlawfulness of a conspiracy arises from acts subsequent to its formation and to those originally contemplated, only those persons participating in the unlawful acts are liable therefor. It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme. 11 Am. Jur., Conspiracy, Section 48.

Attention is also drawn to citations appearing in Vol. 3, Permanent A.L.R. Digest, Conspiracy, Section 1. Attention is specifically drawn to case of *A. T. Stearns Lumber Co. vs. Howlett*, 52 A.L.R. 1125, holding that the unlawfulness of a conspiracy may be found either in the end sought or the means used.

The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

In 168 P (2d) 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

Here plaintiff alleges in Paragraph VI, that between 3/2/44, and 8/18/50, defendants did wrongfully and maliciously conspire, combine and confederate together with willful and malicious intent

to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph VII.

In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 P (2d) 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and interrelated activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

The Statute of Limitations does not bar this action.

The running of the Statute of Limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Co.*, 260 Mo. 212, 169 SW 145, the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Ind. 660, 161 NE 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the Statute of Limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colo. 365, 21 P (2d) 182; 41 Hun 645, 3 N.Y.S.R. 309;

In *Northern Kentucky Tel. Co. vs. Southern Bell Tel. Co.*, 73 F. (2d) 333, 97 A.L.R. 133, is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence. See also the annotation in 97 ALR 137.

It must also be noted that in this action the Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant.

The case relied on by defendant, i.e., *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff's original complaint.

As held in the case of *Moffett vs. Commerce Trust Company*, 75 F. Supp. 303, where jurisdiction is based upon diversity, a Federal Court will apply state rules with respect to statutes of limitation. No decision can be found in which the Supreme Court of the State of Washington has ruled as to what the applicable statutory period of limitation is for civil conspiracy, nor how to compute the time, that is, from the last overt act or from

some other time. Accordingly, the matter is apparently one of first instance in this court, and the court is at liberty to settle upon whatever rule impresses the court as being the best reasoned and most equitable.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

ANALYSIS OF SECOND AMENDED COMPLAINT

Second Amended Complaint Para.	Page	Line	Where Found in Previous Complaints
I	1	13	All previous Complaints contain same paragraph.
II	1	20	L. 23, p. 1—#2
		21-24	New allegation.
		24-26	L. 27, p. 5—#2
			L. 31, p. 1—#2
		26-28	L. 1, p. 2—#2
		29-31	L. 29, p. 1—#2
		32-33	L. 29, p. 2—#2
	2	1-3	L. 19, p. 1—#2
		4-5	L. 1, p. 5—#2
III	2	7-10	L. 29, p. 1—#2
		10-12	L. 22, p. 2—#2
		12-15	L. 32, p. 1—#2
		15-17	L. 31, p. 1—#2
		18 (Ex. A)	P. 2-4—#2
IV	2	21-25	L. 1, p. 2—#2
		26-29	New, but can be inferred from reading Exhibits pleaded in #2.
V	2	31-33)	L. 1, p. 5—#2
	3	1-2)	
VI		4-15	(L. 23, p. 1—#2 (L. 27, p. 5—#2 (L. 20, p. 27—#2 (General conclusions of law.

Second Amended Complaint Para.	Page	Line	Where Found in Previous Complaints
VI(A)		16-20	L. 31, p. 5—#2 plus new conclusions of law.
		20-25	L. 18, p. 12—#2
		26-27	New conclusions of law.
		27-28	L. 31, p. 5—#2
		28-31	Inferential.
		31-32	(L. 27, p. 5—#2
	4	1	(
VI(B)		2-4	L. 27, p. 6—#2
		4 (Ex. B)	P. 7-10—#2
		7-9	New.
VI(C)		10-20	L. 13, p. 12—#2 plus new allegation that McKelvy then became conspirator.
		21-32	(L. 18, p. 12—#2
	5	1-5	(
		6 (Ex. C,D)	P. 16-20—#2
		7-14	Paraphrase of Ex. E
		15 (Ex. E)	P. 14-15—#2
		17-19	L. 28, p. 12—#2
		19-31	P. 13—#2
		31-32	New conclusion.
	6	1-7	L. 27, p. 15—#2
		7	L. 31, p. 20—#2
		8	New allegation.
		9-16	L. 1, p. 16—#2
		17-18	L. 1, p. 21—#2
		19-25	Paraphrase of Ex. F.
		25-27	L. 1, p. 21—#2
		27-28	L. 6, p. 27—#2
		29 (Ex. F)	P. 21—#2
VI(D)		31-33	(L. 28, p. 2—#1
	7	1-5	(
		5-6	L. 15, p. 23—#2
		7 (Ex. G)	P. 23-25—#2
		8-10	L. 15, p. 23—#2
		10-12	L. 10, p. 23—#2
		13 (Ex. H)	P. 22-23—#2
		14-16	L. 5, p. 3—#1
		16-17	L. 11, p. 25—#2
		18-23	L. 12, p. 25—#2
		23-26	L. 22, p. 25—#2
		26-29	P. 25-26 Paraphrase—#2
		29-30	L. 6, p. 26—#2
		30-31	New allegation.
		32	(L. 30, p. 26—#2
	8	1-3	(
		4	L. 14, p. 27—#2

Second Amended Para.	Complaint Page	Line	Where Found in Previous Complaints
VI (D) Cont.	9	5-9	L. 8, p. 27—#2
		10-12	L. 13, p. 6—#1
		13-14	Inferential.
		14-16	L. 13, p. 36—#2
		16-18	Inferential.
		19 (Ex. I)	P. 36-45—#2
		21-23	L. 20, p. 27—#2
		24-32	Conclusions.
		1-3	Conclusions.
VI(E)		4-5	L. 24, p. 27—#2
		6	L. 3, p. 28—#2
		6-7	Inferential.
		7-14	L. 4, p. 28—#2
VI(F)		15-18	L. 13, p. 28—#2
		19 (Ex. J)	P. 29-33—#2
		20-29	L. 13, p. 28—#2
		29-31	New allegation.
VI(G)	10	32	(L. 22, p. 33—#2
		1-4	(
		5 (Ex. K)	P. 33-34—#2
		6-7	L. 24, p. 33—#2
		7-9	L. 1, p. 35—#2
		10 (Ex. L)	P. 35—#2
		11-14	L. 1, p. 35—#2
		15-17	New allegation.
		18-21	L. 1, p. 46—#2
		21-23	Inferential.
		23-29	L. 7, p. 46—#2
		31 (Ex. M)	P. 46-62—#2
		31 (Ex. N)	P. 62-65—#2
VI(H)	11	1	Conclusion.
		2	L. 24, p. 34—#2
		4-6	New allegation.
		6-7	L. 14, p. 65—#2
		8 (Ex. O)	P. 65-66—#2
		9-10	L. 14, p. 66—#2
		10 (Ex. P)	P. 66—#2
		11-12	L. 5, p. 66—#2
		13	L. 6, p. 67—#2
		14-15	L. 7, p. 67—#2
		15-16	Inferential.
		16-18	L. 29, p. 69—#2
		19 (Ex. Q)	P. 67-73—#2
		21-22	L. 32, p. 73—#2
		22-24	L. 3, p. 74—#2
		25 (Ex. R)	P. 74-82—#2

Second Amended Complaint Para.	Page	Line	Where Found in Previous Complaints
VI (H) Cont.		27-29	L. 1, p. 74—#2
		28 (Ex. S)	P. 82-83—#2
		30-32	L. 29, p. 83—#2
		31 (Ex. T)	P. 83-84—#2
	12	1-2	L. 29, p. 83—#2
		2-4	L. 1, p. 85—#2
		4-5	L. 3, p. 85—#2
		5-6	L. 4, p. 85—#2
		6	L. 10, p. 85—#2
		7-9	L. 8, p. 85—#2
		10-13	New conclusions of law.
VI(I)		14-22	L. 11, p. 85—#2
		22-25	New allegation.
VI(J)		26-32	L. 2, p. 87—#2
	13	1 (Ex. U)	P. 86—#2
		3-6	Inferential
		6-8	L. 6, p. 87—#2
		9 (Ex. V)	P. 87-90—#2
		10-13	L. 24, p. 90—#2
		13-15	L. 22, p. 90—#2
VI(K)		16-19	L. 15, p. 91—#2
VII		21-32	(Allegations re damages—
	14	1-7	(conclusions

Respectfully submitted,

/s/ WILLARD HATCH.

Attorneys for Continental
Casualty Company.

[Endorsed]: Filed August 6, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Cor-
poration; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

ORDER OF DISMISSAL

This matter came on regularly for hearing before the above-entitled court on August 6, 1951, on motions for an order to dismiss the above-entitled action by defendants Sam Macri, Don Macri and Joe Macri, by defendant W. R. McKelvy, and by defendant, Continental Casualty Company, a corporation. Defendants Macri appeared by their attorney, Granville Egan; defendant McKelvy appeared by his attorney, A. P. Curry; and, defendant Continental Casualty Company appeared by its attorneys, Carl E. Croson and Willard Hatch. The plaintiff M. C. Schaefer appeared per se. Prior to the argument the plaintiff presented to the court a Motion for Order Permitting Filing of Supplemental Complaint, which petition was without veri-

fication and also without any supporting affidavit as to factual matters. The defendants, being prepared to present their motion, stipulated that any facts contained in the motion might be considered by the court in passing upon the motions of the respective defendants. After discussion it was so stipulated by all parties, and the court reserved passing upon the Motion for Order Permitting Filing of Supplemental Complaint until after hearing the arguments on the Motions to Dismiss. The Court then requested the parties to proceed with arguments for and against the motions filed by the above designated defendants, and after hearing arguments on the motions by the respective attorneys for the defendants appearing before the court and by M. C. Schaefer, plaintiff, appearing per se, and the court having stated that it was his intention to grant the motions of the respective defendants, and having been requested by all parties, plaintiff and the three defendants before the court, to grant the Order of Dismissal with prejudice and without right to amend,

It Is Now, Therefore, Ordered and Adjudged that the above-mentioned motions to dismiss the complaint, and each of them, are granted, and the above-entitled action as to defendants Sam Macri, Don Macri, and Joe Macri, defendant W. R. McKelvy, and defendant Continental Casualty Company, a corporation, is hereby dismissed with prejudice and without leave to amend.

And the Court having granted the motions to dismiss,

It Is Further Considered and Ordered that the Motion for an Order Permitting the Filing of a Supplemental Complaint, made by the plaintiff, be, and hereby is, denied.

It Is Further Ordered and Adjudged that the defendants, and each of them, be, and hereby are, granted a judgment for costs against the plaintiff as provided by statute and rules of court.

Done in Open Court this 7th day of August, 1951.

/s/ WILLIAM J. LINDBERG,
Judge.

Approved:

SAM MACRI,

DON MACRI,

JOE MACRI,

By /s/ GRANVILLE EGAN.

W. R. McKELVY,

By /s/ A. P. CURRY.

CONTINENTAL CASUALTY
COMPANY,

By /s/ CARL E. CROSON.

Receipt of Copy acknowledged.

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

ORDER SETTING AMOUNT
OF BOND ON APPEAL

This matter coming on regularly for hearing before the undersigned Judge of the above-entitled Court upon motions by the defendants appearing herein for an order setting the bond for any appeal in a sum in excess of \$250 and the court being fully advised in the premises, now, therefore,

It Is Hereby Ordered that plaintiff upon giving notice of appeal shall file a bond for costs on appeal in the sum of \$250.00 for each of the defendants, or a total cost bond of \$750.00.

Done in open court this 7th day of August, 1951.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ A. P. CURRY,
Attorney for Defendant,
W. R. McKelvy.

/s/ GRANVILLE EGAN,
Attorney for Defendants
Macri.

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents:

That I, M. C. Schaefer, am held and firmly bound unto Sam Macri, Don Macri and Joe Macri; to Continental Casualty Company, a corporation; and to W. R. McKelvy in the penal sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars, which said sum has been deposited in cash with the clerk of the above-entitled Court, payable to the above designated obligees, their heirs, executors or assigns, for which payment to be made I bind myself, my heirs and executors firmly by these presents.

The condition of this obligation is such that:

Whereas, the said M. C. Schaefer has taken an appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court dismissing with prejudice plaintiff's Complaint on August 7, 1951, and in connection therewith the said trial court by Order fixed the Appeal Bond in the sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars.

Now, Therefore, if the said M. C. Schaefer shall pay all costs and sums which may be awarded to the above obligees, not exceeding Seven Hundred Fifty and no/100 (\$750.00) Dollars by Order of said appellate court pursuant to said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ M. C. SCHAEFER,

Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Comes now appellant, M. C. Schaefer, and designates the following pleadings, proceedings and memorandum which he wishes prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above-entitled cause:

1. Plaintiff's original complaint.
2. Motion of defendant McKelvy to dismiss plaintiff's original complaint.
3. Motion of defendants Sam Macri, Don Macri, and Joe Macri to dismiss plaintiff's original complaint.
4. Motion of defendant Continental Casualty Company to dismiss plaintiff's original complaint.
5. Complete transcript of reporter's notes of the hearing on the motions of the defendants W. R. McKelvy, Sam Macri, Don Macri and Joe Macri, and Continental Casualty Company to dismiss plaintiff's original complaint.
6. Order granting the motions to dismiss.
7. Plaintiff's amended complaint.
8. Motion of defendant W. R. McKelvy to dismiss.
9. Motion of Sam Macri, Don Macri and Joe Macri to dismiss.
10. Motion of Continental Casualty Company to dismiss.

11. Complete transcript of reporter's notes on hearing on said motions to dismiss.

12. Order granting motions to dismiss.

13. Plaintiff's second amended complaint.

14. Motion of defendant W. R. McKelvy to dismiss.

15. Motion of defendants Sam Macri, Don Macri and Joe Macri to dismiss.

16. Motion of defendant Continental Casualty Company to dismiss.

17. A complete transcript of the reporter's notes on hearings of motions to dismiss.

18. Plaintiff's motion for permission to file supplemental complaint.

19. Order of dismissal.

20. Order fixing appeal bond.

21. Notice of appeal.

22. Appeal bond.

23. Statement of points on appeal.

24. Appellant's designation of contents of record on appeal.

25. All letters, notes, memoranda or documents of any kind or character not hereinbefore specifically mentioned, it being intended that the complete file be sent up on appeal.

Dated this 31st day of August, 1951.

Respectfully submitted,

/s/ M. C. SCHAEFER,

Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now the plaintiff and appellant herein, M. C. Schaefer, and pursuant to Rule 19 of the above-entitled Court, states that he will rely upon the following points in the prosecution of his appeal from the order of dismissal herein:

1. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state a cause of action, and there is nothing in the file or in any of the records that will sustain this order granting the motions to dismiss.

2. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state tortious acts and overt acts within the statute of limitations and within a few months of the filing of the original complaint herein.

3. The United States District Court erred in denying plaintiff's motion to file supplemental complaint alleging additional facts with respect to the defendant W. R. McKelvy and naming as an additional party one W. R. Rask and alleging new matter as to him in that said additional allegation of new matter are extremely vital to plaintiff's case.

/s/ M. C. SCHAEFER,
Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

Telegram
May 8, 1951

From M. C. Schaefer to Judge Driver

Portland, Oregon, May 8, 1951.

To (Sam Driver)

Hon. Sam Driver,
303 Federal Bldg.,
Spokane, Wash.

Re Schaefer vs. Macre—Object to Any Ground
for Dismissal Except Redundency. Letter Follows.

M. C. SCHAEFER.

[Endorsed]: Filed Sept. 27, 1951.

Letter
May 8, 1951

From M. C. Schaefer to Judge Driver

Portland, Oregon.
May 8, 1951.

The Hon. Sam M. Driver,
United States District Judge,
303 Federal Building,
Spokane, Washington.

Re: Schaefer vs. Macri et al.,
No. Civil 2673.

Dear Judge Driver:

This will acknowledge receipt of copy of Order of
Dismissal submitted in behalf of the Defendant
McKelvy.

I object to the language beginning with the word "does" at the end of line 16, page 1, to and including the word "complaint" near the center of line 21. As I read your memorandum opinion your sole basis was the fact that the complaint is verbose or redundant.

Also as to proposed Order submitted in behalf of the Macris, I object, for the same reason, to the language beginning in line 22, page 1, with the word "fails" to and including the word "complaint" in line 24.

This same objection is made as to all defendants should the others incorporate such language in their orders.

Very truly yours,

/s/ M. C. SCHAEFER.

cc: Skeel, McKelvy, Henke, Evenson & Uhlmann,
914 Insurance Building, Seattle, Washington.
Granville Egan,
565 Olympic National Bldg.,
Seattle 4, Washington.
Carl E. Croson,
900 Insurance Bldg., Seattle 4, Washington.

[Endorsed]: Filed Sept. 27, 1951.

REPORTER'S CERTIFICATE

August 6, 1951

United States of America,
Western District of Washington—ss.

I, Earl V. Halvorsen, do hereby certify:

That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable William J. Lindberg, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on August 6, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above-entitled cause.

Dated this 27th day of August, 1951.

/s/ EARL V. HALVORSON,
Official Court Reporter.

[Endorsed]: Filed Sept. 27, 1951.

REPORTER'S CERTIFICATE

August 7, 1951

United States of America,
Western District of Washington—ss.

I, Earl V. Halvorson, do hereby certify:

That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable William J. Lindberg, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on August 7, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above-entitled cause.

Dated this 27th day of August, 1951.

/s/ EARL V. HALVORSON,
Official Court Reporter.

[Endorsed]: Filed Sept. 27, 1951.

Letter

August 21, 1951

From E. V. Halvorson to M. C. Schaefer

August 21, 1951.

Mr. M. C. Schaefer,
3535 East Burnside,
Portland 15, Oregon.

Dear Mr. Schaefer:

With respect to transcript of August 6 and 7, 1951, I will not be able to forward them until Monday, August 27, 1951. I will then air mail them.

Trusting delivery at that time will meet with your approval, I remain,

Sincerely yours,

/s/ EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed Sept. 27, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT J. HAGE, et al.

State of Oregon,
County of Multnomah—ss.

We, the undersigned, being first duly sworn, each for himself on oath deposes and says:

That I was personally present in the Court Room of the United States District Court for the Western District of Washington at the hearing in the above-

entitled case had before the Honorable William J. Lindberg on August 6, 1951.

That I have carefully examined a copy of the transcript of such proceeding prepared and certified by Earl V. Halvorson to be true, correct and complete.

That I know of my own personal knowledge that some of the material appearing in said transcript is stated differently from what actually occurred; that some of the statements actually made have not been incorporated in the transcript; and that some of the matters contained therein never occurred.

I am willing to be sworn and under oath testify to the matters wherein the transcript certified by the reporter varies from the true facts within my own personal knowledge.

/s/ ROBERT J. HAGE,

/s/ PATRICIA HAGE,

/s/ GALE G. WHEELER,

/s/ PATRICK L. DARCY,

/s/ RAYMOND R. STAUB,

/s/ M. C. SCHAEFER,

/s/ GERTRUDE SCHAEFER.

State of Oregon,
County of Multnomah—ss.

Be It Remembered, That on this 22nd day of September, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally

appeared the within named P. L. Darcy, Gale G. Wheeler, Robert Hage and Patricia Hage, husband and wife; Raymond R. Staub, and M. C. Schaefer and Gertrude Schaefer, husband and wife, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER W. VOSS, et al.

State of Washington,
County of King—ss.

We, the undersigned, being first duly sworn, each for himself on oath deposes and says:

That I was personally present in the Court Room of the United States District Court for the Western District of Washington at the hearing in the above-entitled case had before the Honorable William J. Lindberg on August 6, 1951.

That I have carefully examined a copy of the transcript of such proceeding prepared and certi-

fied by Earl V. Halvorson to be true, correct and complete.

That I know of my own personal knowledge that some of the material appearing in said transcript is stated differently from what actually occurred; that some of the statements actually made have not been incorporated in the transcript; and that some of the matters contained therein never occurred.

I am willing to be sworn and under oath testify to the matters wherein the transcript certified by the reporter varies from the true facts within my own personal knowledge.

/s/ WALTER W. VOSS,

/s/ CHRISTINE VOSS,

/s/ VIOLA N. HEALY,

/s/ PAUL C. VOSS,

/s/ GLADYS L. CARSON.

State of Washington,
County of King—ss.

Be It Remembered, That on this 25 day of September, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Walter W. Voss, Christine Voss, Viola N. Healy, Gladys L. Carson and Paul C. Voss, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] /s/ E. I. HEILINGLOH,
Notary Public in and for the County of King, State
of Washington, Residing at Seattle, Wash-
ington.

My Commission expires June 22, 1953.

[Endorsed]: Filed Sept. 27, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF M. C. SCHAEFER

State of Oregon,
County of Multnomah—ss.

I, M. C. Schaefer, being first duly sworn, depose and say that the following is a true and complete resume of dealings and conversations with Earl V. Halvorson, court reporter, with respect to procuring transcript of record to proceedings on August 6 and August 7, 1951, in the above-entitled case:

On Monday, August 6, 1951, after Court, plaintiff asked Mr. Earl V. Halvorson, the court reporter, to get up seven copies of the transcript of that day and mail them to plaintiff and asked when he could get them to plaintiff. Halvorson said, "I will have them in the mail to you by Thursday or Friday, the 9th or 10th."

On Tuesday, August 7, 1951, after Court, plaintiff

checked with Mr. Halvorson again and had him change the order of the 6th to only three copies and ordered also three copies of transcript of the hearing on the 7th. Mr. Halvorson then said: "I will have both out and in the mail not later than Monday, the 13th."

On Friday, August 17, 1951, plaintiff called Mr. Halvorson from Portland and Mr. Halvorson said the transcripts were in the envelope sealed with postage on it ready to mail last Monday, the 13th, but: "I am waiting for Judge Lindberg, the Judge always checks the papers before I mail them out. They will definitely be in the mail Monday, the 20th."

On Thursday, August 23, 1951, plaintiff received a letter from Mr. Halvorson dated on the 21st and mailed on the 22nd which states as follows: "With respect to transcript of August 6 and 7, 1951, I will not be able to forward them until Monday, August 27, 1951. I will then air mail them. Trusting delivery at that time will meet with your approval, I remain,"

On Friday, August 24, 1951, Mrs. Gilbert Tooke, plaintiff and plaintiff's wife drove to Seattle, checked at the Court House to ascertain if Judge Lindberg's court was in session, but found that his court was not in session. Plaintiff checked with an elevator girl as to Mr. Halvorson's office number. She suggested that plaintiff check with Judge Lindberg's secretary. Plaintiff then checked with the Judge's secretary. Plaintiff asked her what Halvorson's office number was and she told plaintiff it

was Room 808. Plaintiff asked: "Is the Judge in?" She said: "No." Plaintiff asked: "Is he yet on his vacation?" She said: "Yes, he is yet on his vacation, but might drop in sometime today." Plaintiff asked: "Do you know if Mr. Halvorson is in Seattle?" She said: "He lives in Tacoma, but may, of course, be in Seattle." She then gave plaintiff Halvorson's address and phone number in Tacoma. The three of us then left the Court House and later that day plaintiff called Mr. Halvorson at Tacoma. Mr. Halvorson said: "I wrote you a letter and haven't yet heard from Lindberg. I have everything ready to drop in the mail. The Judge will be in court Monday at 2:00 o'clock. We have a case on for that time, but I think I will perhaps get to see the Judge in the morning and will get the transcripts into the mail in the afternoon for sure." Plaintiff said: "Well, I thought the Judge and you only had a two-week vacation." Halvorson said: "That's right; it ends this week end." Plaintiff said: "You have the copies for me ready to mail out, so if the Judge were to call you at your home there, you could go right out and drop them in the mail?" Mr. Halvorson said: "Yes, I have them here and will do that." Plaintiff said: "The two days, the 6th and 7th, were two days that were part of or should have been the start of your vacations?" Halvorson said: "Yes."

A little later that afternoon we three drove to Halvorson's residence at Tacoma. Plaintiff asked Mr. Halvorson: "Might I see the transcripts, as I have a few things I would like to check in each of

them?" Mr. Halvorson said: "I don't have them here. They are in my office in Seattle and are all ready to put in the mail. I have taken them to the post office and had them weighed and the postage put on them—that's what I always do, so they are ready, so that as soon as the Judge checks them I can just drop them in the mail." Plaintiff said: "Well." Halvorson said: "The Judge's secretary has them." Plaintiff said: "Then the Judge hasn't got them with him on his vacation then?" Mr. Halvorson said: "Yes, he has; he's got all the copies with him. If they were here, why I'd be glad to open them up for you or give them to you and we'd save the postage. I'll see the Judge Monday and will get them in the mail in the afternoon and will mail them air mail, special delivery."

On Monday, August 27, 1951, plaintiff's wife and plaintiff went to the Court House and plaintiff checked the file herein and then plaintiff and his wife waited in the anteroom of Judge Lindberg's court. This was before the morning recess. At recess Mr. Halvorson came out of the Court Room. Plaintiff said: "Hello, Mr. Halvorson." Mr. Halvorson said: "I have all the papers in my Room 808. I still have to make the affidavits and put on the backs." Plaintiff said: "Then you will have your lunch by 12:30?" Halvorson said: "Well, let's say 1:00 o'clock. I'll be through earlier, but some of the others come into my office to eat their lunch—it's quiet up there—and they might not be through." Plaintiff said: "OK."

At about 11:00 o'clock Court recessed till 1:45.

While plaintiff was waiting for his wife to come out of the women's wash room, he was resting against the wall and near the door to Judge Lindberg's chambers. This door opened from within. Plaintiff saw it only as it closed, so did not see the party that had opened it, so as soon as plaintiff's wife came from the wash room, plaintiff and his wife went to the 8th floor. Plaintiff told his wife he thought Halvorson was in the Judge's chambers, so plaintiff and wife waited in the hallway on the 8th floor for a little while when the stairway door opened and Mr. Halvorson immediately said, as he came into the hallway and headed into the men's wash room on seeing plaintiff and wife in the hall, "The Judge is still reading it, he hasn't read it yet." On coming out of the men's wash room, he bee-lined for his office without looking around at all. Plaintiff followed toward his door and said: "You haven't this material in your office then and ready to mail with exception of affidavit and backing?" Mr. Halvorson said: "Did I say that? I've got the stamps here and I told you I'd have it ready for you by 1:00 o'clock." He went into Room 808, slammed and locked the door. At 1:02 o'clock we went back to Mr. Halvorson's office. Mr. Halvorson and Judge Lindberg's secretary were in the room. The secretary said: "Hello, Mr. Schaefer," and immediately left the room. Mr. Halvorson handed plaintiff the envelope with copies of transcripts (no stamps on envelope). Plaintiff pulled out a copy and did a little checking on that part of it of the 7th and asked Mr. Halvorson to read

certain lines on page 4 from his shorthand notes. His notes read to the same as the transcript (his notes were in a two-ring binder). Plaintiff said: "There's something wrong here." Halvorson immediately got up and, looking at the time, said: "I've got to go right now or I'll be late." Plaintiff asked him for his bill so he could pay him for the transcripts. Halvorson said: "I'll make it out and mail it to you at Portland." We then left his office at 1:13 o'clock p.m.

/s/ M. C. SCHAEFER.

Subscribed and sworn to before me, a Notary Public, this 22nd day of September, 1951.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

State of Oregon,
County of Multnomah—ss.

I, Gertrude Schaefer, being first duly sworn, say that I am the plaintiff's wife in the within-entitled affidavit, and that those parts of the foregoing statements beginning on page 1, line 31, to page 5, line 7, are true as I verily believe, with the exception of the following statements which took place on Friday, August 24th, starting on page 2, line 13. I did not hear the plaintiff's conversation with the elevator girl; plaintiff's conversation with Judge Lindberg's secretary, nor did I hear Mr. Halvorson's side of the telephone conversation.

/s/ GERTRUDE SCHAEFER.

Subscribed and sworn to before me this 22nd day of September, 1951.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

State of Oregon,
County of Multnomah—ss.

I, Goldada W. Tooke, being first duly sworn, say that I am the Mrs. Gilbert Tooke referred to in the within-entitled affidavit, and that the facts stated beginning on page 2, line 13, through page 3, line 25, are true as I verily believe, with the following exceptions: I did not hear the plaintiff's conversation with the elevator girl; plaintiff's conversation with Judge Lindberg's secretary, nor did I hear Mr. Halvorson's side of the telephone conversation.

/s/ GOLDADA W. TOOKE.

Subscribed and sworn to before me this 22nd day of September, 1951.

[Seal] /s/ F. C. HOWELL,
Notary Public for Oregon.

My Commission expires 5-20-53.

In the District Court of the United States for
the Western District of Washington, Northern
Division

Number 2673 (Civil)

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals, and W. R. McKELVY, and
CONTINENTAL CASUALTY COMPANY, a
Corporation; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

Re Motion of Defendants to Dismiss Second
Amended Complaint of Plaintiff

August 6, 1951

Appearances:

M. C. SCHAEFER, the Plaintiff,
Appeared in His Own Behalf; and

GRANVILLE EGAN, ESQ.,
Appeared on Behalf of Sam Macri, Don
Macri and Joe Macri, Defendants; and

MRS. ALTHA P. CURRY, of
SKEEL, McKELVY, HENKE, EVENSON
AND UHLMANN,

Appeared on Behalf of W. R. McKelvy,
Defendant; and

CARL E. CROSON, ESQ., of
CROSON, JOHNSON AND WHEELON,
Appeared on Behalf of Continental Cas-
ualty Company, a Corporation, Defend-
ant.

Whereupon, the following proceedings were had,
to wit:

The Court: In the matter of M. C. Schaefer vs.
Macri, et al.

Mr. Schaefer: I am ready, your Honor.

The Court: Are the Defendants?

Mrs. Curry: The Defendant McKelvy is ready.

Mr. Croson: The Defendant Continental Cas-
ualty Company is ready, your Honor.

Mr. Egan: The Defendants Macri are ready,
your Honor.

The Clerk: There is a motion to file a supple-
mental complaint. I don't know whether Counsel
for Defendants have the motion or not. The Court
has a copy.

Mr. Schaefer: I have given a copy to Defend-
ants' Counsel.

The Court: Mr. Schaefer, do you wish to make
a comment?

Mr. Schaefer: Yes. I am sorry that I haven't
been able to get this in sooner. I was somewhat

perplexed with the problem and method in which it should be submitted to the Court.

I would like to read this to the Court and I think it should be acted on before going into the motion to dismiss.

The Court: The Court has read this motion, it having been brought to the attention of the Court about ten (10) or fifteen (15) minutes ago. In substance, you are asking that authorization be [3*] given to amend your Complaint and also to file supplemental complaint to include another party.

Mr. Schaefer: That is right.

The Court: Well, the Court in a matter of this character—appreciating that the Plaintiff is acting as his own counsel—would not be disposed at this point to grant an amendment to the pleadings when the matter is set for argument.

However, in the interest of saving time, I am wondering if the Counsel for the Defendants here have any comments to make in regard to this matter?

Mr. Croson: May we have just a moment, your Honor? I want to see if other counsel agree with me in the matter.

The Court: Yes.

(Whereupon, Counsel for Defendants conferred briefly.)

The Court: The Court's thought is this: That if any time is to be saved ultimately in this matter by making provision for any other ruling, the Court

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

would be happy to hear from all parties before proceeding.

If you wish to consult further, you may.

Mr. Croson: If your Honor please, I am Carl Croson, and I represent the Continental Casualty Company. This is all new to me, just as new to me as to your Honor; in fact, I am five (5) minutes later in getting it than your Honor. I have had no opportunity to inquire into any of the matters set up in this motion.

Permission is requested to join an additional party and, [4] if your Honor should feel that there are sufficient grounds set forth in this motion—which is not accompanied in any way by an affidavit of fact—then we would prefer, of course, to have the entire matter set down for a hearing along with the other matter and argue the entire matter at one time.

I call to your Honor's attention that this motion is not supported by any affidavit of fact and there is nothing before your Honor that says anything except the motion, and this is what the pleader says:

The Court: The Court is aware of that, Mr. Croson, but, having in mind the circumstances wherein the Plaintiff is not represented by counsel, it places the matter in a somewhat different category than otherwise.

Now, the Court would make this suggestion: That this matter go over until this afternoon, at which time you might consider this development, if it is agreeable, unless you have other commitments that make it impossible. The Court has a naturalization

hearing at two (2:00) o'clock, which ought to be disposed of before three (3:00) o'clock.

The Court would be disposed to hear any comment at that time and might proceed with the argument on the motion to dismiss at three (3:00) o'clock having, by virtue of this new feature, to necessarily reduce the time of argument.

The Court would be disposed, unless you have some persuasive argument or comment to cause the Court to do otherwise, to put this matter over until three (3:00) o'clock and allow Plaintiff one (1) hour [5] for argument and the Defendants combined one (1) hour. I think, perhaps, I would hear first from the Defendants as to any argument they wish to make, or comment they wish to make, on this last pleading, this last motion.

Mrs. Curry: Your Honor, the matters alleged here, with respect to my client, Mr. McKelvy, are unfamiliar to me. But, be that as it may, I don't think it helps out his Complaint and I would be willing to consider all these as allegations in the Complaint, regardless of the fact that they are not verified, in order to dispose of it.

The Court: In order to bring it to issue?

Mrs. Curry: In order to bring it to issue and dispose of the thing once and for all.

We are hauled up here time and time again and I would like to get the matter disposed of at this time.

The Court: In other words, it would be your position—I will ask other counsel if they concur in this statement made by Mrs. Curry—it is your

position that you would stipulate that the matters, insofar as they constitute an amendment to the Complaint, set forth in the motion, or alleged motion, might be considered as being incorporated in the Complaint now on file, the Second Amended Complaint, and consider it as amended.

That would not bring Mr. Rask in as a party.

Mrs. Curry: And if your Honor should hold with us then he can bring a separate suit against Mr. Rask.

Mr. Schaefer: I think Mr. Rask is a party to this [6] conspiracy and if you wish to go ahead with the hearing on the motion, I will present more of the material on the conversation had with the man in the office and then I would ask that my request be granted and that I have whatever the law provides as to time for the serving of Mr. Rask and bringing him into the picture so that if this should go to the Circuit Court of Appeals that Mr. Rask is named and that the papers are properly in order.

Mr. Croson: May I make a suggestion?

The Court: Yes.

Mr. Croson: What would your Honor think of proceeding with the hearing? I am just as anxious as Mrs. Curry to get the matter heard. Then let your Honor consider the motion with this motion in front of your Honor. Perhaps your Honor does not care to rule on the motion to permit the additional Defendant on just the motion but to go ahead and hear these motions to dismiss now, having in mind that there may be a new party added.

I believe your Honor can, as Mrs. Curry said, on the Second Amended Complaint, pass on that now regardless of what is set up here. I don't think there is anything set up here that, if it were in the Complaint, would make one bit of difference except to bring in an additional party. There is nothing alleged in there that changes the situation insofar as any other party. That is why I made the suggestion that there is no affidavit of fact before your Honor.

I don't think it makes any difference, but I am perfectly willing that your Honor should have that in mind when you pass on it. [7]

The Court: I am wondering, in considering the stipulation—agreement—as to what is contained in here as being applicable to the Second Amended Complaint, if it would be safe in making that general stipulation without reading the matter. Do you get what I mean? When we say, in stipulating, that all applicable material in here may be considered as having been added to the Complaint. Is that general stipulation sufficient?

I am not speaking now as to whether or not that is in accordance with what you desire but, assuming we proceed on the theory that we are going to allow the motion to dismiss and accept this insofar as it will amend the allegations of the Complaint, will the general stipulation be sufficient? I will have to defer to Counsel in this matter, they being more familiar in that phase of it. Do you feel it is sufficient for your purpose?

Mr. Croson: I think it is.

The Court: Are you willing to proceed?

Mr. Croson: That is not——

The Court: That is not the Plaintiff's desire, I understand. Well, the Court is going to proceed, Mr. Schaefer, with hearing argument on the motion to dismiss.

It has been agreed to by Counsel for the Defendants that the allegations, insofar as they are proper and applicable, contained in your motion for order permitting filing of supplemental complaint as being amendatory of the Second Amended Complaint, may be considered and that the motion to dismiss will be argued on that basis. [8]

The Court at this time is not going to postpone or set over this matter for the purpose of filing supplemental complaint.

Mr. Schaefer: By that you mean, your Honor, that I will be permitted to present before the Court here then the additional material that I have on the conversation—relative to the conversation—had down at my office, so that all the material then will be in the file in case this thing goes to the Circuit Court of Appeals?

The Court: This matter being before the Court on an argument for motion to dismiss, your statement as to the conversation—that is evidentiary matter which would not properly be part of argument on the allegations of the complaint on the motion to dismiss.

But, any argument you may make, the Court Reporter will take, and the record will show what comments you are making in argument.

I think the effect of the Court's ruling is this, Mr. Schaefer: The Court is not granting leave at this time to file a new complaint, an amended complaint or supplemental complaint, as is indicated in your request, but, by stipulation of counsel, that material in this motion which might be amendatory of the Complaint is, by stipulation, being made a part of the record so that insofar as it could amend your existing Complaint it is being made applicable, but the Court is not permitting a new complaint to be filed at this time which would bring in a new party, namely, B. J. Rask, as an additional defendant.

Mr. Schaefer: Would that preclude the possibility of [9] bringing Mr. Rask into the picture at a later date? I feel he is a party that should be named in this conspiracy.

The Court: It would depend, Mr. Schaefer, in part on what would happen as a result of this motion. If you have an independent action, if you have an action which will include that, which would include Mr. Rask, the Court would not undertake to say whether you might be legally entitled to bring another action or not.

Mr. Schaefer: I think that he was instructed and had information from the present parties, before I requested him to become a party, of the facts of this suit sufficient to come down there and make the threats that he did and he evidenced that fairly clearly after we got in the conversation in a few minutes, and I think there is somebody, there is either one or more of the present Defendants, that

have given him the information and so instructed him to do, and I don't see why he should not be made and included as a party.

This thing isn't yet in there for argument, but it is in there for—that is, the issues really haven't been joined, I don't believe.

The Court: The Court is attempting to be reasonable and realizes you are without counsel but, of course, the Court can not completely disregard rules of procedure and the Court feels that it is only reasonable in this matter to proceed on the motion to dismiss, particularly with Counsel being willing to stipulate as to these facts insofar as they are proper and applicable being included in the Second Amended Complaint. [10]

Do the parties—Counsel—feel that there is sufficient preliminary record made to warrant going ahead?

Mr. Croson: Yes, your Honor.

The Court: Then the Court will proceed to hear argument, hearing the Defendant first, Mr. Schaefer.

Mr. Schaefer: Yes.

The Court: The Court will recess at a quarter to twelve (11:45), and then, because of naturalization proceedings, this matter will have to go over until three (3:00) o'clock.

So, what arrangements have Defendants made for time?

Mr. Croson: If your Honor please, I have made a digest of the Complaint and I believe it is satisfactory to the other counsel if I proceed with that analysis of the Complaint, which appears to be the

real question before your Honor, this case having been passed on by Judge Lemmon and the trial court that heard the matter in the beginning in District Court, and it would seem to me that it might be helpful to your Honor to see in what particulars, if any, this Second Amended Complaint differs from the two preceding complaints.

Your Honor is not bound by any decision made by the other Judges, of course, but it looked to me like it might be helpful if your Honor had before you what, if any, new material we have in this Second Amended Complaint that was not in the preceding complaints.

I understood from a young man in our office, Mr. Hatch, that that was somewhat in your Honor's mind at the time this hearing was set, so that I am prepared to meet that situation. [11]

As I understand now, there is one (1) hour for the combined three (3) Defendants?

The Court: Well, we permitted one and a half ($1\frac{1}{2}$) hours to begin with. That was the understanding several weeks ago when we set the date. Now you may have until a quarter to twelve (11:45). You may have one and a quarter ($1\frac{1}{4}$) hours.

Mr. Croson: Now, if your Honor please, the law of conspiracy is very simple and I am starting out with the assumption that all parties have the law clearly in mind.

In the first place, there is no such thing as an act of conspiracy. It is merely that thing which may bring parties together in such a position that any

one of the parties involved may be guilty of a tort which may be committed by any one of them.

The action is a tort action and, as far as a conspiracy is concerned, it is nothing but saying how many people are responsible for that tort.

The old stock definition that we learned in law school, all of us, is that it is doing an unlawful act, or doing a lawful act for an unlawful purpose.

So, we start out with that thought in mind, as we have done in the preceding arguments. Now, the first Complaint was passed on by Judge Lemmon and advice was given. I don't know whether your Honor has seen the record, but Judge Lemmon's remarks are in the record and he gave Plaintiff plenty of advice as to how he should have to plead in order to plead a case of conspiracy. [12]

The amended complaint came in and in that amended complaint there were various allegations. Conclusions of law were liberally pleaded throughout the pleadings, together with testimony, and that again was passed on after argument and again suggestions were made to the Plaintiff as to how he would have to plead.

He comes in then with the Second Amended Complaint and I represent the bonding company, and I will direct my remarks to the bonding company, but what I am suggesting to your Honor now is applicable to the Complaint for all parties concerned.

I hope that this may be of some help to your Honor, and I passed counsel an analysis of the Second Amended Complaint and I am passing up to your Honor, as sort of a guide, what we have

prepared in trying to analyze this rather voluminous document which consists now of allegations which combine statements of fact and conclusions of law. Practically the same thing is within the amended complaint except now it is segregated and made exhibits and they are now pleaded as exhibits, taking that out which, apparently which, was included before as a part of the pleadings.

Now, analyzing the Second Amended Complaint with the analysis that I have given your Honor.

Paragraph I of the Second Amended Complaint is the same in both the preceding complaints.

Paragraph II we have taken line by line and analyzed that, and in the Second Amended Complaint we have lines 21 to 24 as a new allegation. Not new facts entirely, but it is a new [13] allegation.

I am going to try to present to your Honor all the places in this complaint that the Continental Casualty Company is mentioned as a conspirator and mentioned as a party Defendant.

“The Defendant Continental Casualty Company, a corporation, was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors.” Now, that is new material as contained in paragraph II of the Second Amended Complaint. It is a new statement.

I will again comment on that as we go to the new material to see if it has added anything.

“Continental Casualty Company, a corporation,

was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors.”

Now, that particular language, as pleaded, is, of course, the pleader’s own language. That will become material as we come to the conclusion of the Complaint because that is not quite the position, I believe, that has been taken by the Plaintiff heretofore in connection with litigation pertaining to this matter.

Following down paragraph II: “that the defendant Clyde Philp was the agent and attorney in fact in the State of Washington for said Continental Casualty Company; that said defendant Clyde Philp also was a partner with the defendant A. J. Goerig; and said Philp and Goerig were silent joint venturers with the defendants Sam [14] Macri, Don Macri and Joe Macri . . . ”

The Court: You are representing both Continental and the——

Mr. Croson: No, I do not. Our interests are entirely adverse in this suit. Our interests are adverse to all parties because, as a matter of fact, as to Continental Casualty Company, judgment was entered in which Continental Casualty Company had to pay the judgment with the other parties being unable to respond, as the pleadings——

The Court: Just so that the Court may be clear: Is anyone representing Goerig and Philp?

Mr. Croson: No. As far as I know, they are not represented. No judgment was granted against

them in the lower court but they are named as parties here but are not represented.

Mr. Schaefer: Your Honor, we were unable to get service on them.

Mr. Croson: That is the answer. I didn't know.

Those are the two places that the Continental Casualty Company is mentioned as far as that page is concerned.

At the top of the next page we have Continental Casualty Company under the statement that Mr. McKelvy was the attorney for Continental Casualty Company.

Now, following on down to paragraph III, we have this statement:

“ . . . and on the same day the defendant Continental Casualty Company issued its performance bond and its payment bond [15] protecting the United States and, among others, this Plaintiff, which said bonds were duly signed and sealed by the defendant Clyde Philp as attorney in fact for Continental Casualty Company . . . ”

Now this plaintiff, as the plaintiff now appears, is appearing before your Honor as one who has won a case in the District Court where he was granted judgment for time and materials and that judgment has been paid. That is the original suit in which he brought action against these parties and was heard in the District Court at Yakima. Judgment was entered and Continental Casualty Company has paid that judgment. So that this is not a suit for time and material. It is a conspiracy suit for some sort of a tort that may have been committed by

these parties. That is all we are looking for now.

It is not a question of was their liability of these parties but, have these parties created a new liability to the Defendant—to the Plaintiff—by reason of subsequent actions. I take it that any action which had been committed prior to the time that that suit was heard will, when that time comes up, be considered as having been merged with the judgment at the time when all the parties were before the Court and the Court heard it.

That is not, of course, in this case right at the moment because of the fact that ours is a motion to dismiss the Complaint as set up, but, from these files set forth, we are able to get the factual situation as I have given your Honor.

A judgment has been entered.

Continental Casualty Company has paid. [16]

Paragraph III speaks of having entered this performance bond for the payment of labor and materials and that is not before your Honor now.

Then we move on for the next new material which we find in—and for the place where Continental Casualty Company is named—paragraph VI, which says:

“That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage, and defraud the plaintiff in his performance of said sub-contract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its

assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said wilful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said sub-contract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following":

From there on I take it that the purpose of the Complaint is to allege the conspiracy of which he is complaining.

Now we have the same general conclusion as set forth in paragraph VI—we have the introductory paragraph—we have that same general allegation in both the preceding pleadings and I take it that nothing has been added to this conclusion that is pleaded—no factual matter so far. [17]

Now "A." I take it that this is to set out the tortious act that is ground for action against all parties.

"The defendants Macri in furtherance of said conspiracy wilfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff."

Continental Casualty Company isn't involved in that.

" . . . wilfully failing and refusing to make the excavations in a proper manner, wilfully failing and refusing to do the grading in a proper manner and wilfully failing and refusing to furnish the

kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work . . ."

Continental Casualty Company isn't involved in that at all.

He said:

" . . . all designed and intended to and in fact causing plaintiff considerable unnecessary delay . . ."

That was presented to the Court in the hearing of this case in the District Court hearing.

Now, the last line:

" . . . said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company." [18]

Now, it is not true, and it is not set out in the many exhibits to this Complaint that Continental Casualty Company undertook in any way to do or perform the contract. They gave the bond for payment of labor and materials but not as a party to a contract for the performance thereof.

So that this conclusion is entirely erroneous to even the facts—the facts that are set forth here in his paragraph VI.

Now:

"On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said venture agreement of December 11, 1943."

Now that brings in the fact that while Philp and Goerig were joint parties in the venture prior to this date of July 15, 1944, at that time the joint venture was dissolved.

That was handled by the trial judge at the time of the trial and the rights of the parties were adjudged therein.

Now, this next allegation: It is a new sentence and a new allegation:

“Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plaintiff of a cause of suit or action against Philp and Goerig.”

I don't think this adds anything to the Complaint, a complaint in conspiracy for a tortious act. There is nothing tortious about [19] the arrangements the parties might make between themselves and the Court found that certain liabilities were gained up to that time and the Court held the parties liable for that.

So:

“... on or about the 1st day of November, 1944, the defendant McKelvy became a co-conspirator with the aforementioned defendants...”

Now we have then this situation. We have some kind of an agreement. It we have any agreement we would have had to have had an agreement prior to that time and where is there any agreement of any kind which is pleaded that would bring parties in to make a tortious agreement?

This brings McKelvy in as a co-conspirator on

the 1st day of November, 1944. He has pleaded acts prior to that time.

When did the agreement take place that would make that tortious act, if any there be, an action against Macris, an action against McKelvy, and Philp and Goerig? Where is there anything that shows any agreement that makes Continental Casualty Company a party to an agreement?

In Number C, now, they bring McKelvy in as of November 1, 1944. As of November 1, 1944, he became a conspirator.

“... on that date plaintiff employed said defendant McKelvy and the said defendant McKelvy accepted employment by plaintiff as his attorney to terminate said sub-contract dated March 15, 1944, on account of the breaches by said Macris and to sue said Macris [20] and Continental Casualty Company for the reasonable value of the work done to the date of termination, and also to terminate a second sub-contract with said Macris under job specification 1068, dated April 21st, 1944, under which no work had been done by either plaintiff or said Macris as of that time.”

He said:

“Plaintiff at that time made full disclosure to said defendant McKelvy . . . ”

And then he pleads the rest of that VI C, and his complaint is again what he alleged McKelvy did not do.

Finally he ends up with this—running through that whole “D.” He comes to this conclusion on page 8:

“That all the aforesaid acts and omissions by the defendant McKelvy were done intentionally and knowingly and as part of and in furtherance of the original conspiracy by the other defendants, and were designed and intended first to cause plaintiff to become bankrupt if possible, and secondly to cause plaintiff to be disgraced and disqualified in his personal and business reputation and credit, if he followed the advice given by defendant McKelvy, and that the aforesaid acts and omissions by the defendant McKelvy were part of a deliberate attempt to lead the plaintiff on through intentional stalls and delays to the point where plaintiff would be powerless to sue the said Macris because of the running of the statute of limitations; all of which was prevented only by the diligence of plaintiff; and that all of said acts were done knowingly, wilfully and intentionally in concert with the [21] other defendants and contrary to and against the interests of plaintiff, and as part of the aforesaid conspiracy.”

Now, if your Honor please, there is nothing new that can be claimed as far as these pleadings are concerned with paragraph VI except lines 26 and 27 on page 3, which is nothing but a conclusion, and then lines 7 to 9 on page 4, and on page 9 we have the conclusions pleaded.

Nothing at all new except as we find it in—well, no, that comes down in “F,” on this same page.

Now, take “E”:

“Shortly after the 20th of October, 1945, plaintiff then retained the services of an attorney in Yakima,

Washington, who promptly investigated the facts and then accepted the employment which Mr. McKelvy had originally accepted, and on or about the 1st of December, 1945, made a written demand upon the defendants Macri for the payment of sums allegedly due the plaintiff for the performance of work under the sub-contract . . .”

And that notice was given that if they didn't pay up, why, suit would be started immediately.

“F”:

“In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out [22] herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff's alleged breach of said second sub-contract dated April 21, 1944 . . . ”

Well, then, he tells us that that suit was dismissed and it came over and was consolidated for hearing as a cross-complaint in the case held at Yakima.

Now the last place that Continental Casualty Company—all through this Continental Casualty Company is not mentioned—in all this matter they are not mentioned except as to the defendants. On page 10, paragraph K (G), he says:

“Continental Casualty Company then brought to plaintiff's attention for the first time (by contacting

plaintiff's attorney Olson) . . . copy of letter attached as Exhibit L . . ."

They brought to the attention of plaintiff's attorney "the fact that the defendants Philp and Goerig were silent joint venturers with the defendants Macri and asked that the complaint be amended so as to name said defendants Philp and Goerig as additional parties defendant, which plaintiff did."

Continental Casualty Company furnished the information to the attorney for Mr. Schaefer that Goerig and Philp were joint venturers with the Macris. Apparently a fact which the attorney for plaintiff did not know, and then they were joined.

If that is an act of conspiracy—well, I would say it is an act of courtesy that the Continental Casualty Company notified the plaintiff's attorney that these other parties should be named to an [23] action of the kind brought in the Federal District Court at Yakima.

Then he alleges that the,

"* * * suit in the Federal District Court in Yakima was tried on the merits and finally resulted in a judgment in favor of plaintiff and against the defendants Macri, Philp and Goerig, and Continental Casualty Company, for what the trial court thought was the reasonable value of the services rendered by plaintiff under the contract dated March 15, 1944, and as part of the decision in that suit the subject matter of the aforesaid suit filed in Multnomah County, Oregon, on December 14, 1945, (which, after much inconvenience, plaintiff suc-

ceeded in having dismissed and which later became the subject of a cross-complaint and counter-claim by defendants against plaintiff in said suit filed in Yakima, Washington) resulted in adjudgment in favor of plaintiff, and plaintiff was awarded nominal damages. Copy of the memorandum opinion of the trial judge and the judgment in said suit in Yakima are attached hereto as Exhibits M and N, and by this reference made a part hereof as though set out herein in full.”

To which I will refer as a part of the pleadings here in setting forth this complaint which is now before your Honor.

Now, “H”:

“Said conspiracy was thereafter furthered by defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars * * *”

In the first place, there is nothing, in my opinion, that sets forth an original agreement, or plan, or scheme, or device which [24] these parties can be charged with.

Secondly, there is nothing that is added to it by McKelvy’s coming into the picture.

And third, I don’t think that grounds of conspiracy have been set forth up to this point.

Lastly, “H”:

“Said conspiracy was thereafter * * *”

The Court: Excuse me. The Court will now have to interrupt you. Court will stand at recess in this matter until 3.00 p.m. this afternoon.

(Whereupon, at 11.45 o'clock a.m. a recess was had in the within-entitled and numbered cause until 3:00 o'clock p.m., August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:) [25]

Mr. Croson: May it please the Court?

The Court: You may proceed.

Mr. Croson: If your Honor please, I am calling your Honor's attention to page 11, paragraph "H." Your Honor has caught the theory that this Complaint is drawn on, that there is set forth a series of events. I presume that is to overcome an objection which Judge Lemmon pointed out to Plaintiff with respect to the statute of limitations and, apparently, this is an effort to bring some actionable action by the parties within the statute.

However, I think even that fails completely.

Now, paragraph "H" says:

"Said conspiracy was thereafter furthered by defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars, to wit:

"1. Continental Casualty Company led the way in the appeals of the trial court judgment and protected defendants Macri from being precluded from appealing."

Then, dropping to line 11:

"On May 20, 1947, Continental Casualty Company filed its notice of appeal and on July 29, 1947, Goerig and Philp filed their notice of appeal. Not

until August 18, 1947, did said Macris file their notice of appeal * * *"

Apparently the effort is, by some process of reasoning, to feel that by reason of Continental Casualty Company having filed its [26] notice of appeal—motion for new trial on May 9, 1947—that that action was a protection to what otherwise might have been a delayed action on the part of Macris, and I wish to call your Honor's attention to this: that during this entire "H," all the way through, there is just an objection made to the actions taken by Continental Casualty Company in connection with their motion for new trial, with writ of certiorari, and with the court procedure subsequent to the judgment in the District Court.

That is all "H" is. I will refer to it later.

Now, in "I":

By the way, on that page, page 12, lines 10 to 13, in the memoranda I have given to your Honor, it is a new conclusion, new statement:

"All of said acts of separately appealing and delaying were done in furtherance of said conspiracy and were intended to bankrupt plaintiff and preclude his continuing prosecution of the case; and defendants nearly succeeded."

That, of course, was after judgment had been entered by Judge Driver over in Spokane, and all of these alleged—this alleged—misconduct took place after that.

Now, finally, "I," or "I":

"Finally, on or about the 9th of November, 1949, the draft issued by Continental Casualty Company

in payment of the trial court judgment was delivered to plaintiff, but even then and in furtherance of the aforesaid conspiracy, language was intentionally [27] included on the reverse of the draft immediately prior to the space for endorsement, intended to have the effect * * *” and so on.

Then, at the end of the paragraph:

“Neither Philp nor Goerig nor the Macris have yet paid to Continental Casualty Company the judgments obtained by Continental Casualty Company against them in plaintiff’s suit in Yakima * * *.”

Now, paragraph “J” is—paragraph “J”—the only place Continental is mentioned there is in lines 3 and 4, page 13:

“* * * Continental Casualty Company’s appeal bond covered damages from delays on appeal * * *”

And that his counsel was advising Continental Casualty Company that any delays on appeal might result in damages against them for delaying.

Now, I wish also to call attention to paragraph VII:

“That by reason of the premises aforesaid and all of the acts and omissions of defendants and each of them in furtherance of their aforesaid preconceived and concerted plan and conspiracy and as the direct and proximate result thereof, plaintiff for several years thereafter had no personal credit * * *”

Now then, he claims damages for affecting:

“* * * perfecting, developing and marketing certain inventions relating to improvements in tools and methods used in the concrete and construction

business, all of which would otherwise have been perfected and marketed at a substantial profit to plaintiff, all to plaintiff's damage in the sum of one million (\$1,000,000.00) dollars." [28]

Now, let us turn to Exhibit M attached to the Complaint. I will be very brief with this. On page 6 of Exhibit M, these are the words, now, of Judge Driver in respect to—well, in a statement of his understanding of the case and how he was about to decide it as he gave that statement preliminary to counsel:

"Now, coming to the law applicable to this situation * * *"

The last paragraph in the middle of the page.

"It is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy * * *"

Who was then representing Continental Casualty Company.

"* * * United States vs. John A. Johnson and Sons, (2458) 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company."

Now, also turning to page 10. I am not trying to read all of this because of the time involved, but, page 10, beginning at line 20:

"Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound

by that contract and, conversely, it seems to me they should not be able to claim the price in the sub-contract to their benefit * * *

“We have a close question of law and we have a nice [29] question of fact.”

There was testimony and Judge Driver found that \$57,815.87 would be the proper amount. He allowed no interest until date judgment was entered but all the time after that there was interest paid to this plaintiff on that judgment while the appeals were going on.

Now, let's look at page 13 again in the same Exhibit M.

“As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important.”

He was looking after plaintiff's interest quite completely in giving him judgment against them in the event the Appellate Court should reverse his ruling that the bonding company was liable.

Your Honor does not need to look further than that statement in Judge Driver's statement to see that there were appealable issues. He says they were “novel” and “close.”

To sum up my presentation, I have given your

Honor, for what it may be worth, our analysis of this Complaint compared to both the others.

I am safe in saying this to your Honor, that I don't believe that there is any new factual matter pleaded which in any way changes the position of the case as it was heard before Judge Lemmon and [30] before Judge Driver.

Now, this is a matter of record in the case. I am reading from page 44 of the transcript of Judge Lemmon's hearing, and he is speaking these words to Mr. Schaefer.

The Court: What page is that?

Mr. Croson: Page 44 of that transcript, the last full paragraph on that page.

The Court: I have it.

Mr. Croson: "In granting the Motion, I would also grant you time within which to file an amended Complaint, if you can, setting forth and overcoming this question of the plea of the Statute of Limitations. If you did that, you should go into your Complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these Defendants agree to do—and then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the damages with connection between the act done or the acts done and the damage."

Now, nothing could be more kind. I don't know that I have ever been in Court where the judges

have been more kind than they have been to this plaintiff and have given him more directions as to how to stay in court.

The same thing occurred with Judge Driver. Judge Driver's comments I will leave to other counsel to present. They are also matters of [31] record.

Now, summing up my position:

As far as Continental Casualty Company is concerned, it is my position that there is no allegation in words that Continental Casualty Company entered into an agreement as to what was to be done for a given purpose.

Continental Casualty Company doesn't come into the picture until after there has been a grievance between the Plaintiff and the Macris. The Court found that to be justified so that I accept that. The Macris had not fulfilled its part of the agreement and the plaintiff did and then claimed that he had work which he was entitled to payment for on a quantum meruit basis and on that basis he was awarded the amount which the Court found to be due him for material and labor.

They paid. That is what the bonding company was there to do and that is what they did when it was determined. There were nice questions in there and in determining those questions, it takes only the word of the Judge who tried the case to satisfy your Honor that there were appealable grounds and that Continental Casualty Company had a right to take its appeal, which it did, and when it was found against them, they paid the judgment.

So far as Mr. McKelvy and the Macris are concerned, it will be my position that my analysis will be of aid to you.

My position is:

Number one, there is no cause of action so far as Continental Casualty Company is concerned.

Two, that the statute of limitations applies. I believe [32] that that is the case. I am sure your Honor has that record there. There is the case, 100 Fed. 2d 184, on the statute of limitations, Mitchell v. Greenough. I am sure you have it in the record.

Thank you for your attention.

Mrs. Curry: I appear for the Defendant, W. R. McKelvy.

There is no need for reiterating the allegations of the Complaint. I think the Court read it and Mr. Croson carefully analyzed it in regard to the previous complaints.

The only difference I can see in the two complaints is that he took some of the stuff out and put them in as exhibits.

What the conspiracy is: There must be a conspiracy to accomplish some purpose. He doesn't seem to make up his mind what the conspiracy is to do. He has gone into the injuring, damaging and defrauding him in the performance of the sub-contract. He admits that McKelvy didn't know anything about that until he engaged him in 1944.

Number two, he accuses all of us of confederating to bankrupt him and ruin his business and reputation and credit.

Then he has a third conspiracy and that was to defeat the law suit which he sought in Yakima.

The judgment in that law suit was for some fifty-seven thousand dollars and costs and the draft that paid it was \$66,306.48.

The fourth conspiracy was to prevent him from bringing this law suit. [33]

Those are the points he has stated in this law suit.

All that happened was he had a contract with Macris and got in a row with them. The other proceedings show he was covered by Glen Falls, the bondsmen. They were clients of our office and they were sent into our office by them.

He alleges he engaged McKelvy to bring a law suit and that McKelvy agreed to do it and started him along until October, 1945, when he woke up to the fact that he wasn't getting service and demanded to know how long he had before the statute of limitations would run and he was told one (1) month.

However, Judge Driver said if the conspiracy was to prevent the law suit, he was certainly a bungling conspirator.

He admits in the record that he went over to Yakima and engaged Mr. Olson who won his law suit. He was told by our office, and that is true, that our office could not represent him in a suit against Continental Casualty Company because Continental Casualty Company has been a client of ours for some time. That part is true. There is no question about that. But, so far as what Mr. McKelvy did, even the statement—and it is hard to take these

statements and argue the proof of them when some of them, we know, are untrue, but, he says that McKelvy said he would bring the law suit, and he tells of a little memorandum that McKelvy had written to Mr. Kelley in which Kelley looked up some law and saw there was a possibility of quantum meruit.

That memorandum states Mr. McKelvy's word that: "Schaefer insists that he must collect or go broke." [34]

Apparently when the file came back, why, Mr. Schaefer found this little memorandum in it. It was just an office memo which showed there was work on it as to his rights. Then there is an allegation, I don't understand it, about the Macris not being broke but a kid's stealing money and the kid didn't. That is all involving McKelvy except the last where McKelvy stopped off and asked him to pay his bill and that act is alleged in the Complaint. Those are the only allegations against McKelvy, and the services were terminated in October, 1945, and the statute of limitations would run for certainly two years against a conspiracy.

With reference to the law applicable, we have two rather famous cases in this jurisdiction of several years ago. Ransom vs. Dollar Steamship and Ransom vs. Matson Navigation Company.

Ransom was a movie actress who sued everybody. She started out with suits against Matson Navigation Company, 1 Fed. Supp. 244. She says she was shanghaied into a port by Matson Company and then by the Dollar Company and that then she was

put in the insane ward and then she had the Traveller's Society mixed up in it.

The third amended complaint was thrown out in 2 Fed. Supp. 409. Judge Neterer said:*

“A conspiracy has to do with things to be brought about, and is a stranger to things which have passed. The steamship lines are distinct entities, as are, likewise, the defendant persons. There is no statement of any collusive act or circumstance to plaintiff's voyage on the Malolo from Honolulu to Yokahama, which would lead to [35] a conclusion of collusion, confederation, cooperation, or conspiracy to do the acts charged.”

If each of these people did something differently and if she had any law suit, it would be against the Matson Company for assault and against the Dollar Steamship Company for assault and against the Lancaster for libel, and so on. But, there was no agreement.

“The mere statement that the parties conspired, or that there was conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise.”

There is nothing in this Complaint that brings any of these parties together. In our argument last time Mr. Schaefer said, why, there were circum-

(*1 Fed. Supp. 244.)

stances and, as Judge Driver said, extremely circumstantial, but circumstantial evidence to support an allegation must be based on facts so clearly that it is incompetent with any other inference and there are no facts alleged in this case that are so strong as to impel the inference that any of these people confederated to do any of the acts done, and all of them are lawful acts.

Conspiracy is simply a civil action. Conspiracy is to do an unlawful act or do a lawful act to accomplish an unlawful purpose.

You must have in this Complaint allegations of an unlawful purpose. It may be done by lawful acts but for an unlawful purpose, [36] or, you must have allegations of unlawful acts to accomplish a lawful purpose.

There must be interference with a right. There is not an allegation of any unlawful act or any unlawful purpose. There is nothing in here that leaves an inference that is consistent with any other inference that they confederated for any purpose and, as I say, there is no unlawful act or purpose.

One of the best cases in this jurisdiction was the decision by Judge Neterer, 2 Fed. 2d 491, Puget Sound Power and Light Co. vs. Asia, et al. There both sides were represented by eminent counsel in this jurisdiction and this is one of the many cases that involves the bonds of the Puget Sound Company and the row with the City, and Judge Neterer dismissed the complaint because he said there was no unlawful act or purpose alleged, and he said:

“Simple conspiracy is not actionable. Malice or unlawful or fraudulent act is the gist of the action, conspiracy being only matter of aggravation or inducement, and an allegation of conspiracy is not sufficient to sustain an action where no direct fraud is charged. The right of recovery is predicated upon wrong threatened or accomplished, and while the conspiracy may be charged and proved as a matter of aggravation, the recovery is upon the tort. To sustain a tort action, the outgrowth of conspiracy, to impair a contract, acts must be averred which show concurrence of fraud and damage.

“Malice being the gravamen of the offense, it is not enough to say that the act of the defendants is malicious, but the matter [37] of the grievance must be specially set forth to challenge the attention of the chancellor.

“The only act charged against defendant is the bringing of an action in the state court, a court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue, and having a right to sue the law does not inquire into the motives.

“A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished.”

Judge Driver said they would have been lax in their duty if they did not defend that action.

Another case in California is *Lynch v. Rheinschild, et al.*, 195 Pacific 2d 448. That involved a

claim that they were not including certain assets. That was also pro se; the man didn't have a lawyer. The court said:

“In the present complaint there is a total absence of any allegation of any unlawful act or an injurious act by unlawful means.

“Motion for dismissal must be granted.”

Then the Third Circuit. I wanted to get a recent case, *Black and Yates, Inc., et al., v. Mahogany Association, Inc., et al.*, 129 Fed. 2d 227. I comment——

The Court: Is that in your memorandum? Is that in your memorandum?

Mrs. Curry: Yes. That involved a row over the [38] Philippine Mahogany Association and the regular American Mahogany people, and the judge uses rather, well, interesting language.

There is not a single act in here that McKelvy committed that is unlawful. That is not a single purpose of any of the group, if they had combined, that was unlawful. They had a right, with the exception of Macri's breaching his contract. The remedy was had by Mr. Schaefer when he collected some 66 thousand dollars in that lawsuit which we had no part of.

Now the combination must have a meeting of the minds and, as said in *Asby vs. Peters*, there must be an actual meeting of the minds. Judge Neterer said there must be a tacit understanding and, as Judge Driver said, it doesn't mean that the parties must sit down at a table but there has to be a common purpose and an agreement.

Now there has been a great deal of argument in the Court as to whether an act, legal by an individual, can become illegal if done by a group of persons and I am of the opinion that Washington has adopted the rule that conspiracy can not exist—a person can not be guilty—if it is legal for the individual.

Another fault of this complaint is that no damage is alleged. As I said, you must have a claim of the damage and the act and there is no damage alleged in this case flowing from any act.

Mr. Schaefer alleged that he had a lot of trouble bringing the lawsuit, but he won and collected his judgment. He alleges that McKelvy delayed him and that suit was brought down in Portland, but that suit was dismissed and it was made a part of the litigation in [39] Yakima. He says there was conspiracy to prevent him bringing this lawsuit, but he brought it.

He alleges that he was—that his credit was—interfered with, but he doesn't allege how. He alleges that they have tried to make him bankrupt, but he didn't go through bankruptcy.

I think that is about all that he complains of. He says he was unable to profit on some inventions and, of course, that wouldn't make any difference under any circumstances because it would be highly conjectural.

I would like, if the Court will permit, to refer to Judge Driver's comments on the last argument. Judge Driver, you will remember, was the Judge who sat in the Yakima case. A very vicious thing

in this Complaint is that Mr. Schaefer insists that Mr. Willard Skeel of our office ever appeared in the Schaefer case in Yakima and that is absolutely false. In the transcript of the Schaefer case that went to the Circuit Court as an exhibit is this portion of the proceedings held on February 21st, which were the cases involving other parties in which Mr. Schaefer was not a part. I think five were consolidated for trial. They were tried in Yakima and mainly disposed of by pre-trial conference. But a portion of that testimony of Mr. Goerig and Philp was transposed into the Schaefer case and that part of the testimony of those cases, of which Mr. Schaefer was not a party, did refer to Willard Skeel as being attorney for Continental Casualty Company. It is true that he was over there representing in four or five or six cases Continental Casualty Company but in none of those was Mr. [40] Schaefer a party, but the testimony of part of it was pertinent and it was transferred and no one in our office appeared in that case.

On page 60, Judge Driver says:

“I’m just trying to visualize in my own mind what you claim this conspiracy was. I recognize the fact that you don’t have to prove that the defendants got together and made an agreement as people do if they’re selling horses or renting real estate, that a conspiracy is a sort of a back-alley basement affair, usually, and can be proven by circumstantial evidence, but you have to show either directly or circumstantially that there was an agreement between them, an unlawful agreement to do

something to damage you here. Now, it's your position that Macri failed to comply with his part of the contract and was slow in doing it in order to injure you by causing you to become bankrupt?"

And he said, "Yes."

That is what I meant by an agreement. You can prove it by circumstantial evidence but the circumstances must be such that the inference is so strong that it is inconsistent with anything else, and there is no allegation in this Complaint that would lead to an inference that these parties conspired together.

Then, on page 62, Mr. Schaefer was saying that he was attempting, upon circumstantial evidence, and the Court said:

"Extremely circumstantial, I should say. Is it your position that after you went to see McKelvy and tried to get him to represent you, that he went then and talked to Continental and Macri [41] and got into this scheme to ruin you and entered it and became a part of it then?"

And he didn't answer that question.

"I claim that it was he, that by not bringing this suit as he had agreed to do in the first place, and the information and advice that he had gave me during the course of his employment by myself, that he afforded the opportunities to the Macris * * *"

Then on page 63 the Court said, referring to the Yakima cases and all of it:

"It was a very complex series of cases, not only this one but others involving the Continental Casu-

alty Company, and most of them were settled in pre-trial conference.”

Mr. Schaefer said:

“That was with other parties.”

And the Court said:

“Yes, but it necessarily took quite a long time to try out. It’s your position that these proceedings in the Eastern District of Washington continued to constitute overt acts, that is, the proceedings that a defendant and a plaintiff would normally go through in an ordinary lawsuit, that every time the defendants did something over there it was an overt act?”

“Mr. Schaefer: Yes, it is.”

And then the Court said:

“This I must say is a unique and a very unusual experience for me. It’s difficult for me to understand, but I’m trying [42] to get your point of view. Here’s a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn’t think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn’t have bet one way or another * * *”

This is the Judge who tried the case.

“* * * what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. Mr. Holman, of course, was an excellent lawyer and made a good presentation on the other side. I couldn’t see any indication of the slightest conspiracy. I thought it was a

hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought. Now, I don't know; you think here that Mr. McKelvy and the bonding company and Mr. Macri conspired to hold up this performance and ruin you and bankrupt you?

"That's right," he said.

And then going over to page 68, the Court said:

"I'm trying to get at your point of view, Mr. Schaefer. It seems to me your complaint indicates that you allege certain things, that Macri was slow in getting started, and that he held back his [43] performance, and then McKelvy failed to disclose to you that his firm represented or at least they had some arrangement to represent the Continental Casualty Company, and held you up in getting your suit started, and that this suit was brought over here by you against Macri and the Continental, and that certain proceedings went on in that up to the time they paid you the judgment, but what is there to connect these things together and bind them together into an agreement between these defendants? Where and when and what did they do against you that is the basis of this million dollars in damages?"

Again on page 69:

“The difficulty is here, of course, that most of these things you’ve alleged as overt acts do not, because of their nature, carry any inference that they were the product of a conspiracy or that they were intended to do you injury. If there are certain types of unlawful action you can show have been taken, of course we might assume, since there is a concert of action and these things were done in the way they were, we can relate them back and say, ‘These people must have intended the consequences of their unlawful and improper acts,’ and we can assume they must have conspired; but here you’ve got a perfectly natural and normal sequence of events, that a subcontractor got into a disagreement and a jam with his general contractor, here’s a bonding company that stands off in an ordinary way, you went into court and it was determined and the defendants appealed, as they had a perfect right to do, and tried to get certiorari, and finally paid you the judgment. You won the lawsuit and they lost. Aside from that is [44] this difference with Mr. McKelvy that came after you claim the Macris tried to damage you. The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you’ve got, as I see it, that wouldn’t be in the ordinary course of this kind of a transaction.”

And, on the bottom of page 70:

“Well, if the Continental Casualty Company had made a deal with McKelvy to block you out of

court, don't you think they'd have blocked you another month, until your statute of limitations had run, the one year statute under the Miller Act? McKelvy must be a very bungling conspirator if he doesn't hold you up another month and keep you from going into court, when he tells you you've got a month left and you go get another attorney and start your suit. A prime contractor doesn't delay performance at the beginning of the contract in order to ruin a subcontractor, and of all things, a bonding company wouldn't conspire with the main contractor and say, 'You hold back and we'll fix this fellow Schaefer, we'll break him.' Do you think the Continental Casualty Company would do that? That's what you're claiming, although I don't think you allege it in your complaint."

And then again on line 14:

"It happened that your unfortunate experience with McKelvy, the delay in Mr. Macri's performance, the things that the Continental Casualty Company did in contesting this lawsuit, all of them turned out to injure you very greatly, but that doesn't make a conspiracy unless there was an arrangement and an agreement between [45] them beforehand to do that sort of thing."

Going over this page 74, beginning where they talk about—he is referring to Willard Skeel in the Yakima law suit in which he was involved, and then my comment on page 75 I will reiterate:

"Your Honor, that was the transcript of the evidence in the use cases, which on stipulation was in-

corporated in your case, or in Schaefer's case."

They took part of that record out and incorporated it into the Schaefer case.

The Court said:

"Yes, I notice that Mr. Hawkins seems to be the attorney in this matter. There were several of those cases, and the Continental Casualty Company was interested in the use cases as well as your case. All right, go ahead."

And then Schaefer talks and the Court, on page 78, said:

"I think you're mistaken about that, Mr. Schaefer. I think Mr. Skeel appeared in one of the other numbered cases in which the Continental Casualty Company was interested, of course, as bonding company for Mr. Macri, but in which you were not the plaintiff. I'll check that up as best I can."

Now I think that is all except to reiterate this statment. I would like to quote again from 11 Am. Jur. § 45:

"Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts [46] committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. To sustain a civil

action for conspiracy, special damages must be proved.”

There must be a meeting of the minds. There are no combinations in this, because no act is alleged in which you can infer a combination.

Mr. Schaefer’s experience with McKelvy was, one, in our office; and then going over to Yakima and bringing the suits, carried on to appeal and then judgment paid, and then, two, one morning in his office in Portland Mr. McKelvy asked him to pay his bill and he said that that was done in order to prevent him bringing the law suit. Anyway, he refused to pay his bill.

Now, it is not unlawful and does not infer an unlawful act in bringing a law suit. *Abbott v. Thorne*, 34 Wash. 691. I have cited cases on that in the little memorandum. In that case there was an allegation of conspiracy to prosecute unlawfully a civil action and the court said:

“While it is no doubt true that, in some instances . . .”

The court referred to remedy or relief against wrongful law suits. Now this remark:

“While it is no doubt true that, in some instances, the [47] peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burden the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in

the greatest degree with public policy. If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another."

And, quoting an Iowa court:

"If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it."

"It seems to us that there is much common sense in this observation, for the affirmative allegations of an answer are as liable to contain malicious statements as the affirmative allegations of a complaint; and the result would be, if the doctrine contended for were upheld to its logical conclusion, that the plaintiff in an action would be entitled to damages for the unsupported allegations of an answer; for [48] there is as much publicity given to an answer in an action as there is to a complaint . . ."

And the court held that there would be no remedy either against the individual or as conspiracy for the malicious prosecution of a law suit without arrest of the person or attachment, and that was the holding in those two law suits.

These people had a right to defend their law suit in Yakima and there is nothing to connect McKelvy. The case where McKelvy represented the Macris was simply a subrogation case and it was routine and handled by Mr. Rohan in our office.

The Court: Mr. Egan, do you wish to be heard?

Mr. Egan: Yes.

The Court: How much time do you desire?

Mr. Egan: Just very shortly, your Honor.

The Court: Court will take a five minute recess.

(Whereupon, at 4:00 o'clock p.m. a recess was had until 4:05 o'clock p.m., August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: Mr. Egan?

Mr. Egan: May it please the Court, as the Court is probably aware, I represent the Defendants Macri.

Let me go back just a little. We had a prime contract with the United States. We entered into a subcontract——

The Court: The Court is familiar with the [49] facts.

Mr. Egan: Very well, your Honor.

If there is any allegation of acts of a party defendant, the first one would be paragraph VI on page 3. Plaintiff says:

“That defendants and each of them willfully, maliciously and with deliberate intent to injure,

damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:"

That, of course, is an excellent shotgun blast to cover everything within range but I do call the Court's attention to the fact that the Plaintiff uses the words "preconceived plan."

Then the Plaintiff says:

"The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: Willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing [51] to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work,

all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said sub-contract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job * * *"

Then if I may call the Court's attention to Exhibit M, and I am looking at page 4 thereof, starting at page 25.

The Court: Line 25.

Mr. Egan: Yes, line—line 25.

"In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer."

The next point at which we are mentioned, your Honor, is in the Second Amended Complaint, page 4, paragraph B, alleging that: [51]

"On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set

out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plaintiff of a cause of suit or action against Philp and Goerig.”

Then the next one is at page 9, in which it is alleged in paragraph F:

“In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons herein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff’s alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff’s credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only [52] because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.”

So that, your Honor, in December 14, 1945, he alleges, that the Macris filed an action in the Circuit

Court, State of Oregon, that caused him severe damage and reduced him to such an impecunious financial condition that it made it impossible to continue the suit in Yakima, Washington.

On page 10, your Honor, he said that—starting at page 10—he talks about the Miller Act:

“* * * copy of which is hereto attached as Exhibit K, and by this reference made a part hereof as though set out herein in full; which suit was filed on or about the 20th day of December, 1945 * * *”

So the suit in Portland which made it practically impossible for him to continue his suit in Yakima was filed six days thereafter.

Now, the remaining act of defendants Macri, your Honor, under the conspiracy as alleged, consisted of defending the law suit and taking the proper steps on appeal which their attorney thought necessary to protect their interest.

On the first item, which is in paragraph VI, your Honor, and which has relation to the Defendants wilfully failing and refusing to make the excavations in a proper manner and wilfully refusing to do the grading and to furnish the kind and quality of lumber required, obviously, whatever rights he had he put before the court in Yakima because the court found what happened and gave him [53] damages.

The Plaintiff sued because the Defendants Macri had done these things. If this could be done there was no use in entering judgment because one is never safe in obtaining a judgment because this judgment is paid for.

Now in the second item which we are alleged to have performed, we dissolved a partnership agreement. His conclusion is one of law.

The third item, the suit in Portland, was merged with the final suit in Yakima in which he received judgment.

And then, of course, come the items which the Defendants Macri performed in defending the action. Certainly they had a right to defend the action. They did nothing wrongful. Plaintiff says he was injured by their delaying the action, or by going to the Circuit Court of Appeals.

There is nothing wrongful that is alleged in the entire Complaint that has not already been covered by the prior actions.

So the entire matter becomes *res adjudicata*.

Now he has not shown any arrangement or agreement beforehand. He says there was a preconceived plan and yet, he says, the Defendants Macri immediately started to willfully breach the contract so that then, in November he went—that was in March—in November then he went to McKelvy and told McKelvy all the breaches that have been committed by the Defendant Macris.

At that time, obviously, there couldn't have been any cooperation, or any conspiracy, over that matter between McKelvy and [54] the Defendants Macri.

He says there was a preconceived plan and then he says he went to McKelvy after the damages under the contract and told McKelvy what the Macris did to him.

So, obviously, there was no agreement beforehand.

On the other hand, he shows no place that there was any agreement beforehand.

I don't intend to take as much time as the others did because I feel that my predecessors took care of the matter pretty well.

I would like to call your attention to Judge Driver's opinion, one little matter which Mrs. Curry did not cover. I am referring to page 65. I am reading the last words:

"Well, I'll read it, but I don't see how you can contend that when you bring suit against a bonding company and a prime contractor that they haven't got the right to defend that action. I would have thought, frankly, that these attorneys who defended the case, Mr. Holman and Mr. Ivy, I would have thought they weren't doing their full duty if they hadn't defended as they did and if they hadn't taken an appeal, because I thought as a former lawyer and a judge that it was close enough there should be an appeal. I couldn't see any indication that anybody was trying to conspire against you. I didn't think your skirts were any too clean either, although I thought the balance was in favor of you against Mr. Macri."

Our crime is this: We have drifted into insolvency as a result of this, we feel it very keenly. We feel that this has gone [55] beyond prosecution and into the realm of persecution.

If your Honor permits this action—my clients are not Continental Casualty Company and not Mr.

McKelvy—they are people who have been driven out of business—I think we should be secured. Our costs will be tremendous and I think if your Honor is going to permit this action to be brought that my client should be protected in that way.

Mrs. Curry: May I make a statement before Counsel speaks so that he will know our position? I want him to know that we will request your Honor for dismissal without leave to amend this the third time. We will ask, your Honor, for dismissal without leave to amend.

Mr. Schaefer: I will go along with that. If he dismisses I would want it with prejudice so that I would be prepared to appeal.

The Court: I might say, Mr. Schaefer, in carrying on your argument, that this Court has gone over this problem fully and the portions gone over by Judge Lemmon and Judge Driver and I would suggest that you address your remarks to the question as indicated by the Court earlier.

In other words, in what respects have you now cured your Complaint of the deficiencies pointed out by Judge Driver?

Mr. Schaefer: Now on that——

The Court: As you are probably aware, having been against it several times before Judge Driver and Judge Lemmon, an [56] argument of this character is not for the purpose of taking up the issues.

Mr. Schaefer: Now do I understand that I have one hour and fifteen minutes?

The Court: Will that be sufficient?

Mr. Schaefer: I thought you had divided the half hour that had been taken between the two of us.

The Court: Yes.

Mr. Schaefer: Now on this: I am not an attorney and I have the material lined out in such a way as to read the great bulk of the material into the record and for that reason I want to ask whether I am permitted at this time then to go into the motion. That is, to read the motion for order permitting filing of supplemental complaint and also the reading of the memorandum made at the time of this man Rask coming to my office.

That was the line up I was going to follow, and then I was going to go into my statements.

The Court: Well the motion, Mr. Schaefer, has been filed. Are you speaking just about reading the motion itself?

Mr. Schaefer: Yes.

The Court: The motion will be filed and will appear in the record, and I believe counsel have read it.

Mr. Schaefer: Then we will by-pass that.

The Court: It will serve no purpose to read it into the record again. [57]

Mr. Schaefer: Then I will read the memorandum made at the time of this man Rask's appearance into my office.

The Court: In regard to that, Mr. Schaefer, this motion was filed and counsel stipulated that the allegations appearing in that motion insofar as they were applicable and properly pleaded would

be considered as amendatory to the Complaint for the purpose of this motion.

Therefore, it has served the purpose of amending this Complaint but the Court does not permit the joining of another Defendant, namely, B. J. Rask, at this time.

But the allegations insofar as they might relate to the Complaint have been permitted as amendatory for the purpose of this motion.

That would not mean you could recite a conversation. You are alleging here, purportedly alleging, that Mr. Rask came into your office and spoke to you about the insurance and bonding business and divulged that he was working on matters in this law suit and "threatened life and welfare of Plaintiff and intimidated plaintiff and his family if plaintiff persisted in this law suit, and plaintiff alleges that said Rask was and now is a member of said conspiracy."

That purportedly is an allegation relating to this conspiracy. Frankly the Court feels that it may be a conclusion and not properly pleaded and it would not permit you to discuss it.

Mr. Schaefer: Or to hand in a copy of the memorandum? [58]

The Court: The most the Court can do at this time is to permit the stipulation which would be amendatory. That is as far as the Court can go at this time and this matter now is being heard on the motion to dismiss the second amended complaint.

Therefore, it would not serve any purpose to read

into the record the conversation between you and Mr. Rask following, or it transpired, I assume, the date of this.

Mr. Schaefer: On that date, and then there is another that came in on the 5th of April.

Well, then, I will go into my statement.

Your Honor stated at the hearing on July 9, 1951, that my remarks should be directed primarily to the points raised in the last ruling of the Court and that I show wherein this second amended complaint meets the defects of the former complaints.

As I understand these motions, all are identical except McKelvy's which has the same two points as the others but adds two more, namely, misjoinder of causes and of parties, but I take these last two points as being only a different way of saying failure to state a cause of action.

Hence, my remarks are directed to all of the motions.

Judge Driver stated in his ruling on May 2, 1951, as follows:

"In the opening sentence of paragraph III of the amended complaint there appears the statement that the defendants 'did wrongfully and maliciously conspire, combine and confederate together with [59] wilful malicious intent to injure, damage and defraud plaintiff.' On page 5 of the complaint there appears the statement that defendants Macri, Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, defendant Philp, 'were attempting from the beginning of said subcontract to bankrupt plaintiff, ruin his reputa-

tion and credit, by not paying plaintiff as per contract requirements, by not performing their part of the work, or else performing it badly, thereby increasing cost to plaintiff and hampering and delaying plaintiff and exhausting plaintiff's operating capital.'

"If it is the plaintiff's position that these things which he states on page 5 the defendants were attempting to do were the things that they agreed and as a preconceived plan conspired to do, he should definitely so state, and should then set out in the plaint, concise and direct way the rules of civil procedure prescribe, the principal overt acts done in furtherance of the conspiracy including the latest ones which occurred within the statutory period of limitation."

This Second Amended Complaint meets this objection by:

1. In paragraphs II, III, IV and V, I have attempted clearly to show the various close and interlocking relationships between all the various defendants and to show how they all had certain interests in common.

2. In paragraph VI, I allege:

"That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in [60] his performance of said sub-contract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and

its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said wilful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said sub-contract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:"

3. In the sub-paragraphs of Paragraph VI, I set forth the principal acts done in furtherance of said conspiracy:

a. Covers the acts of the Macris in wilful non-performance of their part of the work;

b. Covers the fictitious agreement of the Macris with Philp and Goerig purportedly terminating their joint venture agreement;

c. Deals with the retention of McKelvy and all the statements made and information given to him;

d. Deals with the fact that McKelvy, while purportedly representing me, in fact represented Continental Casualty Company and Macris as attorney of record for them in other cases and did everything in his power to my detriment and for their benefit;

e., f., g. and h. Shows in detail the misuse of the judicial process as part of and in furtherance of the conspiracy;

i. Shows the attempt to preclude this suit when the [61] judgment in the former suit was paid;

j. Shows the attempt by McKelvy in August, 1950, along the same lines.

In paragraph VII, I have alleged the damages flowing from this conspiracy.

The objection that the former complaint was verbose has been met as nearly as humanly possible considering the complexities of the facts of this case.

I believe all the objections formerly raised are fully met and that a legally sufficient complaint has been filed that will stand up under an attack such as here to dismiss for failure to state a cause of action.

My authorities are set forth in a memorandum, original of which I hand you and copy for each of the attorneys.

(Whereupon copy of memorandum handed to court and counsel.)

“Memorandum of M. C. Schaefer resisting motion of defendants to dismiss Plaintiff’s Second Amended Complaint.

“Conspiracies need not be established by direct evidence of the acts charged. They may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused which are committed in pursuance of an apparently criminal or unlawful purpose in common to them. The [62] existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury

from other facts proved. It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means. If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purpose by their acts—often by the same means, each performing some part thereof—the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty. His participation in the conspiracy may be established without showing his name or giving his description.

“11 American Jurisprudence, Conspiracy, Section 38.

“When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each.

“11 American Jurisprudence, Conspiracy, Section 40.

“The prosecutor may either prove the conspiracy, which renders the acts and declarations of the conspirators admissible in evidence, or he may prove the acts of the different persons and thus prove the conspiracy. However, there must be some tangible, material evidence of the conspiracy or a promise of its production before the Court can properly admit evidence of statements made in the absence and without the knowledge of the party against

whom they are offered. [63] The evidence need not be direct, positive, and conclusive; but there should be some evidence, and it is for the Court, in the first instance, to say whether or not it exists.

“11 American Jurisprudence, Conspiracy, Section 42.

“The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination.

“11 American Jurisprudence, Conspiracy, Section 45.

“The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, regardless of whether they were original parties to the conspiracy and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby. However, where the unlawfulness of a conspiracy arises from acts subsequent to its formation and to those originally contemplated, only those persons participating in the unlawful acts are liable therefor. It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme.

“11 American Jurisprudence, Conspiracy, Section 48.

“Attention is also drawn to citations appearing in Volume 3, Permanent A. L. R. Digest, Con-

spiracy, Section 1. Attention is specifically drawn to the case of *A. T. Stearns Lumber Co. [64] vs. Howlett*, 52 A. L. R. 1125, holding that the unlawfulness of a conspiracy may be found either in the end sought or the means used.

“The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

“In 168 Pacific 2d 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

“Here plaintiff alleges in Paragraph VI, that between 3/2/44 and 8/18/50 defendants did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph VII.

“In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 Pacific 2d 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and interrelated activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclu-

sion and is necessary in order to state a cause of action.

“The Statute of Limitations does not bar this action.

“The running of the Statute of Limitations in a civil [65] action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Company*, 260 Missouri 212, 169 S.W. 145, the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Indiana 660, 161 N. E. 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the Statute of Limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colorado 365, 21 Pacific 2d 182; 41 Hun 645, 3 N.Y.S.R. 309.

“In *Northern Kentucky Telephone Company vs. Southern Bell Telephone Company*, 73 Federal 2d 333, 97 A. L. R. 133, is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence.

“See also the annotation in 97 A. L. R. 137.

“It must also be noted that in this action the

Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant.

“The case relied on by defendant, i.e., *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the [66] limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff’s original complaint.

“As held in the case of *Moffett vs. Commerce Trust Company*, 75 Federal Supplement 303, where jurisdiction is based upon diversity, a Federal Court will apply state rules with respect to statutes of limitation. No decision can be found in which the Supreme Court of the State of Washington has ruled as to what the applicable statutory period of limitation is for a civil conspiracy, nor how to compute the time, that is, from the last overt act or from some other time. Accordingly, the matter is apparently one of first instance in this court, and the court is at liberty to settle upon whatever rule impresses the court as being the best-reasoned and most equitable.”

Now, it is clearly shown in the record here that W. R. McKelvy represented the Continental Casualty Company and the three Macris at the very time that he undertook to represent me in a lawsuit against these very same parties. We have found no case of record wherein Tom Holman was

at that time representing the Macris, though McKelvy told me on the day that I first met him, on or about November 1, 1944, and he agreed to represent me, that Holman was Macris' attorney, yet McKelvy continued to represent the Macris for better than five months or to and including April 4, 1945.

I think the statement made to me by Mr. McKelvy that though Holman was then associated with another office, that Holman and he (McKelvy) were cooperating as though they were still associated in the [67] same office, is fully borne out by the fact that, bingo, Mr. McKelvy handed Mr. Holman a client on November 1, 1944, and further explains the questions asked by Mr. Holman of Allyn R. Hunter (one of plaintiff's witnesses who handled plaintiff's bonding business as agent for the Glens Falls Indemnity Company) at the trial in Yakima (see transcript, page 966) in answer to a question by the Court:

“Mr. Holman: No, not at all, your Honor, but there is a contention as to whether or not the proceeds of the sub-contract have been assigned to the Glens Falls Indemnity Company.

“Mr. Olson: Is it your contention that the Glens Falls Indemnity Company have advanced some money on this case?

“Mr. Holman: I strongly suspect it, yes, but I can't prove it.

“Mr. Olson: Your suspicions are entirely unjustified.”

Now the only source for Mr. Holman's suspicions

was from the fact that I had made a full disclosure of my financial condition to Mr. McKelvy and together with the facts that Macri had his assets hid, that the letter of February 13, 1945, was claimed not to have been sent, and the fact that the representative of Continental Casualty Company at the time of the acceptance of the draft at Yakima had to phone Mr. McKelvy, go to prove beyond any doubt that Mr. Holman was acting for and as though he was still in the McKelvy office.

Now they make the statement that I received my judgment and that that covered it.

That covered only for the physical product, the physical [68] cost, rather the cost of doing the physical work on the construction job.

We were required to file under the Miller Act. The fact is that we have spent better than 46 thousand dollars out of pocket money to collect just—that is just the cost of collecting the 57 thousand dollars plus interest that we had coming on doing the job.

Now, Mr. McKelvy undertook to represent me and at that time he knew—and there is no excuse—and no one can excuse that—that, even though as Judge Driver said he was a busy attorney in a busy office and that he overlooked that fact—that doesn't seem to satisfy me at all, because here he was representing both the Continental Casualty Company and Mr. Macri at the very time that he undertook to represent me.

Judge Bowen—we were before Judge Bowen

January 9, 1951—taken from the transcript of record, page 22, starting line 12—said:

“My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments, and I do not know how long my cold is going to last, I am inclined to feel for that reason I should ask Judge Lemmon to hear the case, and he will arrange a time in the future when he would be able to hear it.

“Mrs. Curry: Your Honor means by ‘the case,’ the motion?

“The Court: I mean the whole case. Judge Lemmon is like any other judge; he will hear counsel in respect to their convenience about future hearings, if any, to be had.” [69]

That shows that Judge Bowen had an idea that there was more to this thing than just the motion to dismiss.

Then on page 26, starting on line 10:

“I will say to you that I am sorry that you had to spend all of this time before I realized that I felt these arrangements should be made. I did not know this case was on the calendar until this morning, and, of course, I did not realize the time that was involved in the matter.

“I do wish to assure you that the principal reason I have for asking you to consent to this assignment is because I think it could on these motions involve not only today’s work but very considerable additional time, and I have already enough work under advisement on my desk. I do not know how long this cold I have is going to last, and I thought,

out of consideration for you, I should do what has been done, and I understand that all of you consent to it.”

I hoped that Judge Bowen was going to hear it. I believe I answered five questions put to me that I wanted him to hear it.

Now, when it came before his Honor, Judge Lemmon, I was asked by the Clerk about how long I expected it would take me on argument. I said I thought it would take six to eight hours. I was informed that both sides would be heard in two hours and that it would be over with by noon.

So I asked Judge Lemmon, on pages 42 and 43, on line 24, page 42:

“I would like to ask the privilege of a thirty-day time [70] limit for the purpose of filing an amended Complaint because I believe I can file the Complaint in accordance with the facts which is not barred by the Statute of Limitations.”

On page 58, starting line 10:

“I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as thirty days?”

It wasn't on the proposition of a complete dismissal or a complete granting of the motion to dismiss. I had asked for thirty days because I had then an idea of what was going to be required and that I would have to put more material in print.

Then when it comes to Judge Driver's decision the attorneys for defendant sent in their order not

in accordance with what his decision had been but included "for the reason that the Complaint of the Plaintiff fails to state a cause of action against this Defendant upon which relief can be granted."

And, "for the further reason that the said complaint is verbose, redundant * * *" and so on.

Judge Driver said he would give his decision in a few days. It was sixteen days later that I heard his decision. Immediately upon receiving it I sent a wire to Judge Driver. It reads: "Re Schaefer v. Macri. Object to any grounds for dismissal except redundancy. Letter follows."

In the latter dated May 8th: [71]

"This will acknowledge receipt of copy of order submitted on behalf of Defendant McKelvy. I object to the language beginning with the word 'does' at line 16, to and including the word 'complaint' near the center of line 21. As I read your memorandum opinion, your sole basis was the fact that the complaint is verbose and redundant."

On behalf of the Macris', "I object to the same language beginning page 22, line 21, with the word 'fail' to and including the word 'complaint,' page 24. This same objection is made to all defendants should the others incorporate such language in their order."

Judge Driver then wrote his own form of order and in it he says:

"The court heard the arguments for and against said motions and hereby finds that the motions to dismiss, and each of them, should be granted upon the grounds and for the reasons that plaintiff's

complaint does not set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief, and its averments are not simple, concise and direct, but, on the contrary, are verbose, redundant, unnecessarily detailed, and contain much evidentiary, hearsay, and immaterial matter, contrary to the requirements of Rule 8 (a) and (e) of the Rules of Civil Procedure and the complaint does not conform to Rule 10 (b) of such rules which requires that all averments of a claim shall be made in numbered paragraphs, the contents of each of which shall be limited, as far as practicable, to the statement of a single set of circumstances. [72]

“* * * but the plaintiff is hereby granted thirty days from the date of the filing of this order within which to file a second amended complaint.”

Now I was rather surprised. There has been throughout this case so far many statements made that did not conform to my complaint, that weren't quoting the complaint. But, when Judge Driver makes a statement here, on page 16, line 1:

“The Court: Before that it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel and Whitney's office from June to December, 1916, the year I graduated from law school.”

Page 65, line 2:

“* * * I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got

almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought."

Then, line 14, he said, the Court said:

"You really think that, huh?" to which I said——

The Court: Mr. Schaefer, are you directing criticism at the Court?

Mr. Schaefer: I have another paper here that I wish [73] to read. I have just quoted what was said here, your Honor.

The Court: The Court has read that. Is it your purpose to attempt to show prejudice of some kind?

Mr. Schaefer: Yes, your Honor.

The Court: I suggest that, if it would serve any purpose in that respect, Mr. Schaefer, that you confine yourself to the merits.

Mr. Schaefer: Well, I want to clear up a few of these points because of what I have to say after this.

The Court: You may proceed.

Mr. Schaefer: On page 66. Other counsel has read it. On line 2:

"I didn't think your skirts were any too clean either * * *"

In that case over there I had all my witnesses in the hotel room and I told them all, I instructed all of them, to go in there and to not tell a lie. Not

that much of one. (Indicating with fingers.) Leave it to the other side to do any of that. All we need is the facts. Just go in and tell the truth of the matters but neither should they be caught off guard and only give a partial answer, to see that a complete answer was given. And here the judge charges me with having dirty skirts, so to speak. I do not see it.

Then, on page 70, line 2:

“The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you’ve got, as I see it, that wouldn’t be in the ordinary [74] course of this kind of a transaction.”

Mr. Egan said, on April 16th, before his Honor, Judge Driver, starting line 11, on page 52:

“My clients feel it strange that a litigant should break them in one instance and then continue after them after he has enacted his pound of flesh. Perhaps we feel a little more bitter about this, your Honor, than the others do, and perhaps we do not have as much patience as we should have with a man bringing his own action in this. The record, and I’m not going outside the record, your Honor, will show that the Continental Casualty Company paid the judgment in this instance, took judgment over against my clients, and that that judgment remains unsatisfied, * * *”

I think that the Macris are very much in the contracting business. Just recently Mr. Macri together with another company bid on a job in excess

of one million dollars in Alaska and that has been within the last couple of weeks.

I believe also that State Construction Company is a Macri company. I believe that Stateside Construction Company is a Macri Company and they are no small companies.

Now, I would like to read fully these fourteen pages of my Complaint. I feel the reason here is that there have been partial quotations from it which may leave a different opinion even though your Honor, I assume, has read the whole of the complaint.

The Court: Yes.

Mr. Schaefer: May I go ahead and read the whole [75] complaint, that is, these first fourteen pages because there will be certain comments I want to make as I go through the complaint.

The Court: I might ask counsel, do you prefer to continue this evening or to take up in the morning at nine o'clock. The Court has a trial starting at ten.

Mr. Curry: It doesn't make any difference to me. I have been rather opposed to having late sessions but I am so crowded for work at the office that I will be glad to dispose of it.

The Court: The Court is not inclined to having overtime sessions but today having been a very full day the Court is inclined to fall in with the desire of counsel whether they prefer to adjourn until nine o'clock or continue.

Mr. Schaefer: I would prefer to go on.

The Court: All right. I think we will. You

have now approximately one-half hour. Is that about correct? I didn't note the time.

The Court will take a five-minute recess and then you will have until twenty minutes to six.

Mr. Schaefer: All right.

(Whereupon, at 5:10 o'clock p.m. a recess was had until 5:15 o'clock p.m. August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: You may continue.

Mr. Schaefer: Now, your Honor, instead of starting [76] with the reading of this Complaint, I believe that it would serve my purpose a whole lot better to read just two pages and then, perhaps, a few comments.

As I say, I am not an attorney. I was unable to procure an attorney in the State of Washington.

I checked with the Assistant Attorney General and he introduced me to the president of the Bar Association at Olympia. The president of the Bar Association said that, perhaps, there was a rather radical gentleman up here that I might go see, that he had represented, or acted, as counsel for some Communists. So, I didn't go to see that attorney until after we had our suit filed and we were working along on it and I told my wife we would go to see that man, and that we will find that he is a very good friend of Mr. McKelvy's. And so it turned out to be. I asked him whether he would represent me in a suit against an attorney and he said, I will

ask you one question, who is this attorney. And I told him who was involved and he said, "No, I wouldn't. He is a very good friend of mine. I don't mean we go to his house or that he to my house."

His name is—it slips my mind now. I will give it to the Court. I will give the Court his name.

So, I think, if I relate to the Court my feelings about this thing it will do more good all the way around than to read the Complaint again since you have read it.

I want you to indulge me in this. It is going to be somewhat off the beaten path, or off the path you had expected. [77]

My position isn't that easy. I am not going to be intimidated or I will never be able to again feel that I had the right to criticize anyone else. I have criticized like everybody else had and perhaps called this fellow "yellow," or that fellow "yellow."

My honor would be shot. I couldn't unless I would carry this thing on.

I had thoughts of not filing suit and I was then unable to sleep. I told my wife that it was a moral obligation that I go ahead with the suit and clear up such an awful situation and with Christ as my mentor, things would just have to work out so that we would be awarded a Judge that would have the high regard for his position and recognize the fact that it was a position that required of him to be Christlike in his honor.

That this Judge would recognize that we all are here only for one purpose and that he appreciate the fact that man has never made anything. That

all life and all material things are made by Him and perhaps also recognize the fact that there are no true elements as spoken of by the scientists but, on the contrary, that all things are made and can be analyzed to be atoms and thence to the fact that they in turn can again be shown to be of nothing—so the fact that God had made all things from nothing.

All man has ever done is to fashion things and combine things from the things or material that God has provided for man to work with. That the closest thing that man has is his name. That men may derogate ones name but never his honor. That the only one that [78] can ruin his honor is himself. That if man loses money, he loses something if he would have used it to do good; if his name is damaged, he has lost much; but if he loses his honor, he has lost everything.

I carry no animus for anyone. I do not believe that harm will come to me from the intimidation. I believe that some people in some sections of the globe have experienced a hard life, have, through environment and heredity gotten the wrong philosophy of life. I think they should look up to the sky and ponder a few minutes on the possibility of there being perhaps millions of earths such as ours with people on them or that may one day become inhabited by an overflow of people from our own planet and think of the fact that man cannot make anything but only combine or analyze that which God had already provided or to seriously ask himself who am I, and write down his thoughts.

I do not believe in capital punishment but believe that men in high places should be removed from their positions if they do not possess the moral fiber required in such positions. I believe that all men and associations should be held to account for their wrongs or for the stifling of others' rights and, especially if such organization has a monopoly, such as the Bar Association.

I believe that attorneys should be and act as agents of the Courts and that the aim be that justice shall be done and not that the aim of the attorneys be solely the winning of their case by any trick technicality shift of judges so one judge might rely on the findings of the judge before him and make certain findings and the final [79] judge to hear the same case try to relieve his conscience in making a wrongful decision that he only had a small share in the wrong committed.

I believe in such a situation that each of said judges are morally guilty of the whole wrong committed by such decision.

Because of, and basic in the above, I handed to Judge Bowen the small piece of paper on July 2, 1951, and it is also basic and with the transcript of record of April 16, 1951, and the file herein the basis for plaintiff's contemplated suit for the removal from judgeship of Judge Sam M. Driver.

I know that evidence of losses is not to be admitted into evidence at this time, but I have brought some of the exhibits of inventions on which I claim losses and those only on which application for patent have been filed or patent papers granted to

show that the size of my claim has a foundation.

I think I will conclude with that, your Honor.

If you feel, as I said before if your Honor should deny, and if your Honor feels that he should grant these motions to dismiss, I ask that it be done with prejudice so that I can go ahead with the filing of an appeal.

The Court: Do you have any comment?

Mr. Croson: Just two things. I might renew our request with respect to the motion. If your Honor should grant the motion. Also we have a motion for additional security of costs. There is only \$250 provided at the present time.

The Court: Well, the Court sees no purpose in [80] delaying a decision.

The Court has gone over the files at some length and, frankly, is going to grant the motions to dismiss.

The matter has been before Judge Lemmon and Judge Driver and this Court has attempted to analyze this Complaint, realizing that the Plaintiff has acted as his own attorney, but has been unable to see that the Plaintiff has met the defects of the complaint as set forth by Judge Driver and Judge Lemmon.

This Court feels that those motions to dismiss were well-taken and that this Second Amended Complaint, while stated in different language, has not remedied that defect.

The Court is of the opinion that the Plaintiff has not set forth a cause of action and, likewise, that the statute of limitations has run.

The Court sees no further purpose of going into the matter and suggests that, at the request of Plaintiff and the Defendants, it be with prejudice so that it may be appealed.

I might set a date if there is to be any discussion as to form of motion.

Mrs. Curry: Order, you mean.

The Court: I mean order. The Court will set a date. It will have to be this week or the last week in August.

Mrs. Curry: As far as I can conceive, the order is a very simple one. I think your Honor stated it there. I think that is all there is. [81]

The Court: Does the Plaintiff wish to argue the form of the motion to dismiss. If you do, we will fix a time. It should be this week.

Mrs. Curry: Form of order.

The Court: Form of order. I am sorry. The Court will put the matter down for 9:30 tomorrow morning.

Mrs. Curry: That will not be enough time.

The Court: We will make it one-thirty tomorrow afternoon.

(Whereupon, at 5:30 o'clock p.m., August 6, 1951, hearing was concluded.) [82]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

August 7, 1951

The Court: Number 2673, Schaefer vs. Macri, et al.

Mr. Croson: May it please the Court, I am presenting to your Honor an order of dismissal which I have prepared which has been approved by counsel for the other two defendants. A copy is acknowledged as being received by Mr. Schaefer.

I would like for your Honor to read through the order, if your Honor will, because I have tried to incorporate in it an order of dismissal and also a final dismissal of the supplemental complaint on the theory that, when the motions are sustained and dismissed, that automatically dismisses the other.

The Court: The Court will read it through.

Mr. Croson: Yes, if you would.

The Court: Now the Court raises this question: I think it is a matter, possibly, on which the Court might be guided by the desire of the parties inasmuch as it will be incumbent upon the Plaintiff, or the Defendant, to further their own interests on appeal.

Having in mind that this matter may be presented to the Court, Appellate Court, is it in such a form as the Court may most intelligently rule. Do you feel that there is any purpose to be served by being at all specific in setting forth the ruling, the Court having in mind this: In this Complaint, the several Complaints, that have alleged wrongs or claims for relief it appears to be, when you examine the pleadings as a whole, an action in conspiracy. The statute, in the Court's opinion, runs against

such an action as alleged. Assuming that [3*] the claims for relief are properly alleged, is the record in a better position for appeal with this general order, or is there any advantage to any party in having specific grounds set forth. I ask counsel, the Court believing that the form of the proposed order should be satisfactory to the Plaintiff.

Mr. Croson: I think that is a good question. My thought on the matter is this: Your Honor will recall that Plaintiff did desire to have the order recite that it was with prejudice.

The Court: That is right.

Mr. Croson: So that, if your Honor please, in your Honor's statement yesterday you did cover the grounds that are covered in our motions, therefore I felt that an order granting our motions to dismiss, upon all grounds in the motions—if I am in error——

The Court: I don't believe you are in error, Mr. Croson. The sole point is to assist in bringing this to issue in the best manner.

Mr. Croson: And it is for that reason that I tried to close that little gap.

The Court: The Court feels that that would be proper and would have no disposition to change that phase of it.

Mrs. Curry?

Mrs. Curry: A court rule that the Supreme Court passed upon is that any order of the court, upon appeal, can be upheld on any grounds. There-

* Page numbering appearing at top of page of original Reporter's Transcript.

fore, it would be of little value for a person to [4] state the grounds because it can be supported on any grounds in the Appellate Court.

The Court: Mr. Egan?

Mr. Egan: Our reactions are the same as Mrs. Curry. I thought it was proper, your Honor. I joined with it.

The Court: Mr. Schaefer, of course you are not in accord with the final result but, having in mind this order that you would appeal on, which you may if you wish to do, do you have any comments?

Mr. Schaefer: I doubt it. All I am concerned about is that there is no bar or anything that would prevent me from taking an appeal because I do contemplate taking an appeal.

The Court: That is what the Court understands and, of course, it is an appealable order. The Court is disposed, then, to sign this order.

I think the Court should also state for the record that, relative to the parties A. J. Goerig and Clyde Philp, they not having been served, the action is abated as to them. Is that clear, Mr. Schaefer?

Mr. Schaefer: I understand if the judgment against one party in a conspiracy was had, that the judgment would be as to all the parties.

The Court: Not unless they are served.

Mr. Schaefer: Not unless they are served?

The Court: No. Under the rules, I don't think there [5] is any question about it. Under the rules, having once filed a complaint and process having

been issued, unless it is served within three (3) months, the action abates as to those parties. It is a matter of record and the Court makes that statement at this time to show disposition as to parties not named.

The Clerk: There are two motions to set cost bond on appeal.

Mrs. Curry: There is no provision in the rule as to when that should be entered and I read the rule carefully, Rule 73 C, and it was that it could be determined at any time. As a matter of convenience we thought it better to make the motion while the Plaintiff is in court. As modified, it was changed in 1948. After bond is filed the Court can make an order as to sufficiency in form but it leaves the question as to amount open at this time.

I have a proposed order. The trouble is this will require quite an expensive brief and the last brief that I had printed cost \$248 and I don't believe a \$250 bond would cover it because our briefs will be in the neighborhood, the three briefs would be in the neighborhood, of \$700 anyway, and I think it only fair that we be protected to where the cost of the brief is covered anyway.

I think all parties here have made the same motion.

Mr. Croson: My thought in connection with it is, it was stated in open Court and the record so shows that an appeal is contemplated.

The Court: I wonder until such time as an action is [6] taken whether it would be proper for the Court to determine it.

Mrs. Curry: I can see no reason why not. The statute says the Court may enter it. The rule says the bond must be filed with notice of appeal and not less than \$250 unless the Court orders otherwise. How can the Court order otherwise unless it is before the bond is filed. So, it must be before appeal is filed, which means notice of appeal because the bond must accompany the notice of appeal.

The Court: Are you asking in here—I might ask the parties—that three separate bonds be filed? There are three motions and they are all in the same language.

Mrs. Curry: Well, I thought so that we were each protected in a specific amount. I don't care whether it is one bond or a dozen. I wanted our client protected in a certain amount so that one defendant doesn't get all the costs.

The Court: The order says that Plaintiff should furnish bond in the sum of blank dollars for each of the Defendants.

Mr. Croson: One bond I don't object to, but it would be so much for my client.

The Court: Is that true of you too, Mr. Egan?

Mr. Egan: Yes, sir.

The Court: I think, as the Court recalls, the rule, the minimum required is \$250.

Mrs. Curry: That is right.

The Court: Regardless of the number of defendants, [7] and you are asking for the gross amount of how much?

Mrs. Curry: We are asking fifteen hundred dollars.

Mr. Croson: On the theory these defendants are not joined.

The Court: The Court understands. The Court will fix the bond in the amount of \$750, \$250 each. This doesn't say in so many words, but it is surety bond. I believe there is something in the file indicating that the Plaintiff was not able to secure bond.

Mr. Schaefer: That is right, so that I make it a request that it be permitted that I make cash bond.

The Court: You have on file now with the Clerk how much?

Mr. Schaefer: \$250.

The Court: Is that cash?

Mr. Schaefer: Yes.

The Court: We would have to increase that to \$750.

Mrs. Curry: We would need costs after that.

The Court: I think that bond has to stay there. I think the money will remain, the original non-resident cost bond of \$250. I believe this would have to be an additional bond. You understand in the event you prevail you recover the money.

Mr. Schaefer: That is right.

The Court: And in the event you do not, the Court is of the opinion that the costs payable will exceed the amount.

Mrs. Curry: I believe our only costs in this so far is [8] the statutory attorneys' fees. There are no filing fees in Federal Court.

The Court: There have been no costs other than filing up to this point.

Mrs. Curry: I don't think we are entitled to our transcript.

The Court: The order on bond on appeal will be signed and entered.

(Whereupon, at 2:00 o'clock, p.m., August 7, 1951, hearing was concluded.) [9]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed Sept. 27, 1951. [10]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 13129

M. C. SCHAEFER, an Individual,

Plaintiff and Appellant,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTINEN-
TAL CASUALTY COMPANY, a Corporation;
and A. J. GOERIG and CLYDE PHILP,
Individuals,

Defendants and Appellees.

STATEMENT OF POINTS ON APPEAL

Comes now the plaintiff and appellant herein, M. C. Schaefer, and pursuant to Rule 19 of the above-entitled Court, states that he will rely upon the following points in the prosecution of his appeal from the order of dismissal herein:

1. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state a cause of action, and there is nothing in the file or in any of the records that will sustain this order granting the motions to dismiss.

2. The United States District Court erred in entering an order granting the motions to dismiss

in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state tortious acts and overt acts within the statute of limitations and within a few months of the filing of the original complaint herein.

3. The United States District Court erred in denying plaintiff's motion to file supplemental complaint alleging additional facts with respect to the defendant W. R. McKelvy and naming as an additional party one B. J. Rask and alleging new matter as to him in that said additional allegation of new matter are extremely vital to plaintiff's case.

/s/ M. C. SCHAEFER,

M. C. Schaefer, Plaintiff and
Appellant.

[Endorsesd]: Filed Sept. 27, 1951, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the final order of dismissal entered in the cause to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Dec. 1, 1950.
2. Notice of Appearance of defendant, Don Macri, filed Dec. 13, 1950.
3. Marshal's Return on Summons, filed Dec. 18, 1950. (Defendants Sam Macri, A. J. Goerig, and Clyde Philp not found.)
4. Appearance of defendant Continental Casualty Company, filed Dec. 21, 1950.
5. Affidavit of Mailing re above appearance, filed Dec. 21, 1950.
6. Motion of defendant W. R. McKelvy to Dismiss, filed Dec. 21, 1950.
7. Notice of Hearing Motion to Dismiss, filed Dec. 21, 1950.
8. Memorandum of Defendant McKelvy in Support of Motion to Dismiss, filed Dec. 21, 1950.
9. Motion of defendant Continental Casualty Company to Dismiss for failure to State a Claim, filed Dec. 27, 1950.
10. Affidavit of Mailing above motion, filed Jan. 9, 1951.
11. Supplemental Memorandum of Authorities on Part of Defendant McKelvy, filed Jan. 9, 1951.

12. Order of Dismissal as to Defendant Continental Casualty Company, lodged Jan. 13, 1951, (later filed on Feb. 7, 1951.)

13. Affidavit of Mailing Order of Dismissal, filed Jan. 13, 1951.

14. Motion of defendants Macri to Dismiss, filed Jan. 15, 1951.

15. Notice of Hearing on above motion to Dismiss, filed Jan. 15, 1951.

16. Bond for Costs—Non-resident, filed by plaintiff Jan. 17, 1951.

17. Letters, Plaintiff to counsel, acknowledging service re order of dismissal, and striking of motion defendants Macri to dismiss from calendar as amended complaint to be filed, filed Jan. 22, 1951.

18. Court Reporter's Transcript of Hearing on Defendant McKelvy's Motion to Dismiss, filed Jan. 29, 1951.

19. Affidavit of Service of Altha P. Curry of proposed order of dismissal, filed Feb. 7, 1951.

20. Letter, Schaefer to A. P. Curry, dated Jan. 19, 1951, acknowledging receipt of proposed order of dismissal, filed Feb. 7, 1951.

21. Order of Dismissal and Requiring Cost Bond, filed Feb. 7, 1951. (As to defendant McKelvy.)

22. Order of Dismissal as to Defendant Continental Casualty Company, filed Feb. 7, 1951.

23. Amended Complaint, filed Feb. 9, 1951.

24. Demand of Plaintiff for Jury Trial, filed Feb. 9, 1951.

25. Marshal's Return of service of Amended

Complaint and Demand for Jury Trial, filed Feb. 14, 1951.

26. Motion of defendant McKelvy to Dismiss amended complaint, filed Feb. 16, 1951.

27. Supplemental Memorandum of Defendant McKelvy in Support of Motion to Dismiss, filed Feb. 16, 1951.

28. Alternate Motion to Strike of defendant McKelvy, filed Feb. 16, 1951.

29. Motion of deft. McKelvy for Additional Security for Costs, filed Feb. 16, 1951.

30. Affidavit of W. Paul Uhlmann in Support of Motion of deft. McKelvy for additional security for costs, filed Feb. 16, 1951.

31. Affidavit of Service of Motion to Dismiss and other papers, filed Feb. 16, 1951.

32. Printed Transcript of Record, Continental Casualty Company vs. M. C. Schaefer, etc., U. S. Supreme Court, Vol. 1, filed Feb. 16, 1951.

33. Same, volume V., filed Feb. 16, 1951.

34. Printed Transcripts of Record, A. J. Goerig and Clyde Philp vs. Continental Casualty Company, et al., filed Feb. 16, 1951.

35. Letter W. Paul Uhlmann to Clerk Millard P. Thomas, dated 2/16/51, filed Feb. 16, 1951.

35a. Motion defendant Continental Casualty Company to Dismiss or to Strike, filed Feb. 19, 1951.

36. Affidavit of Mailing Motion to Dismiss, filed Feb. 19, 1951.

37. Motion defendants Macri to Dismiss or to Strike, filed Feb. 21, 1951.

38. Letter, Schaefer to Clerk Millard P. Thomas, filed Mar. 3, 1951.

39. Court Reporter's Transcript of Hearing on motion of defendant W. R. McKelvy to Dismiss, and Motion of Defendant Continental Casualty Company to Dismiss for Failure to State a Claim, filed Mar. 23, 1951.

40. Letter A. P. Curry to Clerk Millard P. Thomas, dated 3/24/51, filed March 27, 1951.

41. Motion defendant W. R. McKelvy to Set Hearing on Defendant McKelvy's Motion to Dismiss and Alternate Motion to Strike, filed Apr. 2, 1951.

42. Notice of Hearing on above motion, filed Apr. 2, 1951.

43. Motion of Continental Casualty Company for Setting of Motion to Dismiss, filed Apr. 3, 1951.

44. Affidavit of Mailing of above motion, filed Apr. 3, 1951.

45. Motion of Defendants Macri for Setting of Motion to Dismiss, filed April 3, 1951.

46. Memorandum of M. C. Schaefer Resisting Motion of Continental Casualty Co., to Dismiss or to Strike, filed Apr. 16, 1951.

47. Memorandum of M. C. Schaefer Resisting Motion of Defendant W. R. McKelvy to Dismiss Plaintiff's Amended Complaint, filed Apr. 16, 1951.

48. Plaintiff's Statement Resisting Alternate Motion of Defendant McKelvy to Strike, filed Apr. 16, 1951.

49. Court Reporter's Record of Proceedings at trial Feb. 21, 1947, in Eastern District of Washington, Southern Division, filed April 16, 1951.

50. Court Reporter's Transcript of Hearing on Defendant's, W. R. McKelvy, Motion to Dismiss and Defendant's, Continental Casualty Company, Motion to Dismiss for Failure to State a Claim, filed Apr. 16, 1951. (This is duplicate copy of item No. 39.)

51. Letter, Judge Driver to Counsel, dated May 2, 1951, granting motions to dismiss, with leave to file second amended complaint within 30 days, filed May 2, 1951.

52. Court Reporter's Transcript of proceedings on setting of Motion to Dismiss for hearing, filed Apr. 23, 1951.

53. Court Reporter's Transcript of Proceedings at Hearing on Motions to Dismiss and Alternative Motions to Strike, filed Apr. 25, 1951.

54. Order of Dismissal, but granting plaintiff 30 days to file second amended complaint, filed May 17, 1951, with letter from Judge Driver, dated May 16, 1951, to Plaintiff and counsel attached.

55. Second Amended Complaint, filed June 15, 1951.

56. Demand of Plaintiff for Jury Trial, filed June 15, 1951.

57. Motion of defendant McKelvy for Additional Security for Costs, filed June 21, 1951.

58. Motion of defendant McKelvy to Dismiss, filed June 21, 1951.

59. Notice of Hearing above motions, filed June 21, 1951.

60. Motion defendant McKelvy to Set Hearing

on his Motion to dismiss and Motion for Additional Security of Costs, filed June 21, 1951.

61. Motion defendant Continental Casualty Company for Additional Security for Costs, filed June 25, 1951.

62. Motion defendant Continental Casualty Company to Dismiss, filed June 25, 1951.

63. Affidavit of Mailing, filed June 25, 1951.

64. Motion of Continental Casualty Company for Setting of Motion to Dismiss, and Motion for Additional Security for Costs, filed June 25, 1951.

65. Statement of Plaintiff Schaefer requesting assignment of cause to a judge with qualifications as stated therein, filed July 2, 1951.

66. Motion of defendants Macri to dismiss, filed July 5, 1951.

67. Motion defendants Macri for Additional Security for Costs, filed July 5, 1951.

68. Motion of Defendants Macri for setting motion to dismiss and Motion for additional Security for Costs, filed July 5, 1951.

69. Court Reporter's Transcript of Proceedings before Judge Lindberg, July 2, 1951, filed July 12, 1951.

70. Motion Plaintiff for Order Permitting Filing of Supplemental Complaint, filed Aug. 6, 1951.

71. Analysis of Second Amended Complaint, filed Aug. 6, 1951, by Continental Casualty Company.

72. Memorandum of M. C. Schaefer Resisting Motion of Defendants to Dismiss Plaintiff's Second Amended Complaint, filed Aug. 6, 1951.

73. Memorandum Authorities in Support of Defendant McKelvy's Motion to Dismiss Third Amended Complaint, filed Aug. 6, 1951.

74. Order of Dismissal, filed August 7, 1951.

75. Motion defendants Macri to set appeal bond in sum of \$500.00, filed August 7, 1951.

76. Motion defendant McKelvy to set appeal bond in sum of \$500.00, filed August 7, 1951.

77. Motion defendant Continental Casualty Company to set Amount of Bond on Appeal in amount of \$500.00, filed Aug. 7, 1951.

78. Order Setting Amount of Bond on Appeal in sum of \$750.00, filed 8/7/51.

79. Cost bill, defendant Continental Casualty Company, filed Aug. 7, 1951.

80. Cost Bill, defendants Macri, filed Aug. 7, 1951.

81. Cost Bill, defendant McKelvy, filed Aug. 7, 1951.

82. Notice of Appeal of Plaintiff Schaefer, filed Sept. 4, 1951, with copy of letter, Clerk to counsel transmitting copies, attached.

83. Appeal Bond, \$750.00, cash, filed Sept. 4, 1951.

84. Appellant's Designation of Contents of Record on Appeal, filed 9-4-51.

85. Statement of Points on Appeal by Plaintiff-Appellant, filed Sept. 4, 1951.

86. Copy of Telegram, Schaefer to Judge Driver dated May 8, 1951, filed Sept. 27, 1951.

87. Letter (copy) Schaefer to Judge Driver dated May 8, 1951, filed 9-27-51.

88. Court Reporter's Transcript of Proceedings before Judge Lindberg on August 6, 1951, re Motion of Defendants to Dismiss Second Amended Complaint, filed Sept. 27, 1951.

89. Letter, Halvorson to Schaefer, dated Aug. 21, 1951, filed Sept. 27, 1951.

90. Certificate of Court Reporter Halvorson to Transcript of Aug. 6, 1951, filed Sept. 27, 1951.

91. Certificate of Court Reporter Halvorson to Transcript of August 7, 1951, filed Sept. 27, 1951.

92. Affidavit of Robert J. Hage, et al., and Walter W. Voss, et al. re Court Reporter's Transcript of proceedings on Aug. 6, 1951, filed 9-27-51.

93. Affidavit of M. C. Schaefer re conversations and dealings with Court Reporter Earl V. Halvorson, filed Sept. 27, 1951.

94. Statement of Points on Appeal by Appellant, filed Sept. 27, 1951.

95. Appellant's Designation of Contents of Record on Appeal, filed 9-27-51.

96. Letter, Schaefer to Judge Lindberg, dated Aug. 31, 1951, filed 9-27-51.

97. Letter, Judge Lindberg to Schaefer, dated 9-4-51, filed Sept. 27, 1951.

98. Letter, M. C. Schaefer to Judge Lindberg, dated 9-10-51, filed 9-27-51.

99. Letter, Halvorson to Schaefer, dated 9-13-51, filed Sept. 27, 1951.

100. Letter, Schaefer to Judge Lindberg, dated 9-21-51, filed Sept. 27, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and

charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiff, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 28th day of September, 1951.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13129. United States Court of Appeals for the Ninth Circuit. M. C. Schaefer, Appellant, vs. Sam Macri, Don Macri, Joe Macri, W. R. McKelvy and Continental Casualty Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 8, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

